

Synopsis of Contemporary Reports

1927—1934

ALL INDIA REPORTER

1927	1929	1930	1931	1932	1933	1934
54 I. A. 49 All. 25 A L J	56 I. A. 51 All. 1929 A L J	57 I. A. 52 All. 1930 A L J	58 I. A. 53 All. 1931 A L J	59 I. A. 54 All. 1932 A L J	60 I. A. 55 All. 1933 A L J	61 I. A. 56. All. 1934 A L J
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Synopsis of Contemporary Reports

1914--1925

ALL INDIA REPORTER

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THE ALL INDIA REPORTER

1916

PATNA SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE PATNA HIGH COURT
REPORTED IN

- (1) 1 PATNA LAW JOURNAL (2) 17 CRIMINAL LAW JOURNAL
(3) 32 TO 36 INDIAN CASES

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PATNA HIGH COURT

1916

Chief Justice :

The Hon'ble Sir Edward Maynard Des Champs Chamier, Kt.

Puisne Judges :

The Hon'ble Mr. Saiyad Sharfuddin.

- „ „ F. P. Chapman, I.C.S.
- „ „ B. K. Mullick, I.C.S.
- „ „ F. R. Roe, I.C.S.
- „ „ C. Atkinson. K.C.
- „ „ Jwala Prasad, B.A., LL.B
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	1917 P H C C 40		1 P L J 61		3 P L W 74		1 P L J 893
	3 P L W 226		17 Cr L J 234	282 (2)	35 I C 532	349	34 I C 185
210	34 I C 370		2 P L W 316		1 P L J 133	350	35 I C 43
	1 P L J 129	250 (2)	36 I C 175		2 P L W 432	352	34 I C 44
	20 C W N 699		20 C W N 923	284	33 I C 711	353	34 I C 34
	3 P L W 93		1 P L J 366		1 P L J 48	356	35 I C 622
211	35 I C 512		3 P L W 72		20 C W N 760	357	34 I C 466
	1 P L J 106		17 Cr L J 495		3 P L W 405	361	35 I C 916
	17 Cr L J 326	251	36 I C 197	290	35 I C 779		20 C W N 1274
	3 P L W 69		1 P L J 154		1 P L J 459	362	34 I C 911
212	37 I C 994		2 P L W 365		3 P L W 48	363	35 I C 392
	1 P L J 455	252	38 I C 791	292	35 I C 801	364	34 I C 210
	2 P L W 441		2 P L J 55	FB	1 P L J 386		20 C W N 1048
213	38 I C 96		3 P L W 202		17 Cr L J 369		1 P L J 174
	1 P L J 529		1917 P H C C 67		1 P L W 95	367	35 I C 579
	2 P L W 444	254	36 I C 633		1917 P H C C 1	369	36 I C 178
215	35 I C 345		1 P L J 385	299	34 I C 747		20 C W N 800
	1 P L J 381		20 C W N 1051		1 P L J 43	370 (1)	35 I C 15
	2 P L W 390		2 P L W 361		3 P L W 95		1 P L J 193
216	35 I C 468	256	38 I C 670	200	34 I C 27	370 (2)	35 I C 373
FB	1 P L J 232		2 P L J 48		20 C W N 952	FB	20 C W N 1174
	20 C W N 829	257	38 I C 667		2 P L W 970		1 P L J 406
	3 P L W 62		2 P L J 46		1 P L J 214		1 P L W 13
218	38 I C 116		3 P L W 397	303	36 I C 963	372	34 I C 320
	1 P L J 539	258	38 I C 543		1 P L J 601		1 P L J 206
	3 P L W 161		2 P L J 15		2 P L W 427		17 Cr L J 208
219	35 I C 508	259	35 I C 861	304	34 I C 754	373	35 I C 368
	1 P L J 99		1 P L J 441		1 P L J 37	374	36 I C 206
	17 Cr L J 332		20 C W N 1306		2 P L W 446		20 C W N 1082
	3 P L W 175		2 P L W 383	305	36 I C 653		1 P L J 225
222	35 I C 539	261	39 I C 748		1 P L J 502	375	35 I C 404
	1 P L J 140		1 P L W 548	306	35 I C 837	381	34 I C 616
	2 P L W 389	262	38 I C 509		20 C W N 1354		1 P L J 47
223	35 I C 675		2 P L J 8	307	36 I C 769	382	35 I C 416
	1917 P H C C 77		1 P L W 188	308	36 I C 280		1 P L W 370
225	36 I C 269		1917 P H C C 308		1 P L J 558	384 (1)	36 I C 263
	1 P L J 197	264	38 I C 417	309	35 I C 554		1 P L J 195
	2 P L W 419		18 Cr L J 305		1 P L J 146	384 (2)	35 I C 430
226	34 I C 482	267	35 I C 868	310	36 I C 542		1 P L J 69
	1 P L J 238	FB	1 P L J 573		1 P L J 468	385	36 I C 498
	2 P L W 333		1 P L W 35	312 (1)	35 I C 588		1 P L J 161
232	35 I C 491		1917 P H C C 21	312 (2)	36 I C 562	386 (1)	34 I C 909
	1 P L J 853	268	34 I C 88	313	35 I C 678	386 (2)	35 I C 535
	17 Cr L J 315		1 P L J 92		1 P L J 409		1 P L J 138
	1917 P H C C 71		2 P L W 400	315	36 I C 681	387	35 I C 424
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	1 P L J 533		3 P L W 64		1 P L J 449	391	34 I C 615
	3 P L W 159		18 Cr L J 39	323	34 I C 85	FB	20 C W N 1016
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	1 P L J 536		2 P L W 437	324	35 I C 87		17 Cr L J 229

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	17	<i>Cr L J</i>	348	401	36	<i>I C</i>	744	408	35	<i>I C</i>	433	417	35	<i>I C</i>	544
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THE
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1916

PATNA HIGH COURT

A. I. R. 1916 Patna 1

MULLICK AND ATKINSON, JJ.

Matukdhari Singh—Plaintiff—Appellant.

v.

Ram Das Singh—Defendant—Respondent.

Appeal No. 95 of 1916, Decided on 28th November 1916, from original decree of Offg. Sub-Judge, Patna, D/- 24th January 1916.

Transfer of Property Act (1882), Ss. 86 and 88—Costs can be recovered from mortgagor personally only when decree so directs—Civil P. C. (1908), O. 34, R. 6.

The costs under a decree for sale on foot of a mortgage are part of the amount due upon the mortgage and are recoverable from the mortgaged property and not personally from the debtor, unless the decree itself so directs: 20 *All.* 523 and 35 *Cal.* 431, *Ref.* 14 *Cal.* 185 and 10 *All.* 179, *Dist.* [P 1 C 2]

Fakhruddin—for Appellant.

Sivanandan Rai—for Respondent.

Mullick, J.—The decree-holder obtained a decree for sale on foot of a mortgage on 17th October 1909. He applied for execution and brought the mortgaged property to sale sometime about July 1915. He now seeks in the present execution proceedings to realize a sum of Rs. 716-1-0 on account of the costs granted to him by the Trial Court. It is urged that this sum is the balance remaining due out of a total sum of Rs. 742-3-3 which was the full amount of costs decreed. It appears that the original suit was brought more than six years after the due date of the mortgage and that therefore the amount due on foot of the mortgage for principal and interest was not recoverable personally against the judgment-debtor. The decree-holder explains that for this reason he did not apply for relief

under O. 34, R. 6 of the present Civil P. C., which is analogous to S. 90, T. P. Act of 1882. But he contends that although he did not adopt the remedy provided in O. 34, it is open to him to execute for the balance of the costs as an independent personal decree obtained at the hearing of the suit. He relies upon the case of *Rutnessur Sein v. Jusoda* (1). On the other hand there is a mass of authority which shows that in a mortgage-decree for sale costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property and not personally from the debtor, unless the decree itself so directs. In the case just cited above the Court on a construction of the terms of the decree held that it was open to the decree-holder to proceed personally against the judgment-debtor, for the costs of the original trial. That decision however is no authority for the proposition that in every case where the decree is silent we are to assume a direction that costs are recoverable as a personal debt. The proposition is a somewhat startling one and in order to support it the learned vakil for the appellant was obliged to go to the length of arguing that a decree-holder is not competent to ask for an order under O. 34, R. 6, in respect of costs. In my opinion the decree before us is quite clear and it is impossible to read into it a direction to treat the order for costs as an independent money-decree. It was open to the decree-holder to take the necessary steps under O. 34 and as he has omitted to do so it is impossible here to give him the relief which he requires. I would dismiss this appeal with costs. Hearing fee Rs. 16.

1. (1887) 14 Cal 185.

Atkinson, J.—I desire to add a few observations in addition to those of my learned colleague. With what he has said I entirely agree. The argument which has been addressed to us has been based entirely upon the construction to be put upon the decree of 17th October 1909. That was a decree obtained by a mortgagee in a mortgage suit to recover the amount of his mortgage-debt with principal and interest. The decree was drawn up in pursuance of the provisions of the Transfer of Property Act embodied in Ss. 86 and 88; and the account directed by the statute provides that the amount of Rs. 6,850 is due as for principal and interest and Rs. 742 as for costs of the suit. There is no direction expressly or impliedly given in the decree which would warrant us in holding for one moment that the decree in any way contained a provision imposing personal liability upon the mortgagor to pay the costs, or the balance unsatisfied of the mortgage-debt in the event of the sale-proceeds being insufficient to satisfy all these several items. The decree is in general form; and I personally am satisfied that the decision as reported in *Maqbul Fatima v. Lalta Prasad* (2) correctly and concisely lays down the law applicable to decrees in mortgage suits. The learned Judges there, four in number, in a very strong Full Bench Court, definitely and clearly decided what the effect of a decree prepared under Ss. 86 and 88, T. P. Act, is and the learned Judges say at p. 526 of the report:

"A decree drawn strictly in accordance with the provisions of S. 88 cannot direct the costs of the suit to be recovered otherwise than out of the mortgaged property."

So that in point of law when you have a decree prepared under the joint provisions of Ss. 86 and 88, T. P. Act, you have a decree so far as costs are concerned which can only be realized as against the mortgaged property. I entirely associate myself with the authority of that decision. It is the law in England; and I am glad to say that it is applicable by statute as the law of India. The only other question we have to consider is whether or not there is anything in this decree which would lead us to hold that the decree imposed a personal liability upon the mortgagor to pay these costs. I see absolutely nothing. The case re-

ported as *Maqbul Fatima v. Lalta Prasad* (2) is infinitely stronger than the case before us; and there their Lordships held that there was no personal liability to pay; although in that case there was a clause added to the statutory form of decree which might have led the Court to presume an intention on the part of the decreeing Court to make an order providing that the mortgagor should be liable personally for the costs, if the sale-proceeds should prove insufficient to discharge the same. To like effect is the case reported in *Raj Kumar Singh v. Sheo Narayan Sahu* (3), viz., that the costs awarded in a mortgage suit are recoverable as against the mortgaged property unless the decree otherwise provides. That being so the mortgagee's remedy for costs is as against the mortgaged property. If the property proves insufficient to satisfy the principal, interest and costs then in this country there is a very extensive power given to the Court under what was formerly S. 90, T. P. Act, and is now O. 34, R. 6, Civil P. C., which enables a Court to give a decree in a pending mortgage suit as against the mortgagor for the unsatisfied balance on foot of the mortgage-decree and enables this sum to be realized personally as against mortgagor in respect of properties other than the mortgaged property. That procedure has not been adopted in this case and it is for Mr. Fakhruddin to advise his clients whether an application should be made under that order or not. We offer no opinion on that aspect of the case. All that we can say is that on a consideration of the judgment this application must fail.

I think the decision in *Rutnessur Sein v. Jusoda* (1) and *Damodar Das v. Budh Kuer* (4) do not conflict with the more modern decisions having regard to the facts of those cases. On the facts they are clearly distinguishable from the present case. But no question arises here as to the operation or construction of O. 34, R. 6. When it does it will be time enough to decide it. The mortgagee has not applied under that order and we are not called upon to express any legal opinion on the construction of that order. Suffice it to say that we decide the case on the argument presented so ably to us by Mr. Fakhruddin. I agree with my

3. (1908) 35 Cal 431.

4. (1888) 10 All 179.

learned colleague that this application should be dismissed with costs.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 3 (1)

CHAMIER, C. J. AND JWALA PRASAD, J.
Iswari Prasad Singh—Appellant.

v.

Farkat Hussain—Respondent.

Misc. Civil Appeal No. 187 of 1916,
Decided on 22nd December 1916.

Limitation Act (1908), Art. 182—Decree passed by proper Court—Application for execution to successor, not having jurisdiction to try case saves limitation.

A decree was passed in a suit of the value of over Rs. 1,000 by a Munsif who had jurisdiction try suits up to the value of Rs. 2,000. He was to succeed by a Munsif having jurisdiction to try suits up to the value of Rs. 1,000 only. An application for execution was made to the latter officer:

Held: that the application was made to the proper Court and could operate to save limitation; 6 Cal 513 and 15 Cal 667, *Rel. on.* [P 3 C 2]

Mritanjay Lal and *Kailaspati*—for Appellant.

Muhammad Mustafa Khan—for Respondent.

Chamier, C. J.—This is an appeal against an order of the District Judge of Gaya dismissing an application for execution of a decree on the ground that it is barred by limitation. For the purpose of disposing of this appeal it is only necessary to mention that the decree was passed by the Court of the First Munsif of Gaya on 25th February 1911. The first application for execution was made on 28th June 1913, to the Court of the First Munsif. The Munsif who passed the decree was invested with jurisdiction to try suits up to Rs. 2,000. After the date of the decree and before the date of the first application for execution another Munsif was appointed to the Court, who was not invested with jurisdiction to try cases over Rs. 1,000. The District Judge has taken the view that the first application for execution was not made to the proper Court, apparently because at the time of the application the presiding officer would not have had jurisdiction to try the suit in which the decree was passed. This view is untenable if the decisions in *Latchman Pundeh v. Madan Mohun Shye* (1) and *Kartick Nath Pandey v. Tilukdhari Lal* (2) are correct. The Code of Civil Procedure has been frequently amended since these decisions

were pronounced and a new Code has been passed in place of the Code of 1882, but the provision which was construed in the decisions referred to has never been touched nor have either of the decisions, so far as we are aware, been overruled though there are cases in which they have been distinguished in the Calcutta High Court. In my opinion we ought to follow those two decisions and if we follow them we must hold that the first application for execution made on 28th June 1913 was made to the proper Court and that the present application for execution which was made on 9th June 1915 was made within time. The decisions to which we have referred do not appear to have been brought to the notice of the learned District Judge. I would allow this appeal, set aside the order of the District Judge and restore the order of the Subordinate Judge with costs here and in the lower appellate Court.

Jwala Prasad, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1916 Patna 3 (2)

JWALA PRASAD, J.

Baldeo Lal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 355 of 1916, Decided on 5th December 1916.

(a) **Bengal Municipal Act (1884), S. 240—Prosecution under Municipal Act on complaint of its servants is initiated under Criminal P.C., (1898), Ss. 190 (1) (a) and not (c).**

A prosecution by a Municipality for an offence under the Municipal Act started on the complaint of one of its servants is initiated under S. 190 (1) (a), and not under S. 190 (1) (c), Criminal P. C., and the procedure prescribed under S. 191 does not apply to it. [P 4 C 2]

(b) **Bengal Municipal Act (1884), S. 45—Delegation of powers under S. 45 does not terminate on officer delegating ceasing to hold office.**

The delegation of powers by a Chairman to a Vice-Chairman under S. 45 does not terminate on the officer delegating ceasing to hold office, but continues until it is withdrawn by his successor. A sanction therefore granted for a prosecution under the Act by the Vice-Chairman by virtue of a delegation granted by a previous Chairman which has not been expressly withdrawn is valid and operative. [P 5 C 2]

(c) **Bengal Municipal Act (1884), Ss. 45, 170 and 240—Construction of portions of structure destroyed by fire is "re-erection"—Prosecution for construction while requisition for demolition is pending disposal under S. 176 is legal.**

The construction of portions of a house which had been entirely destroyed is a "re-erection" within the meaning of S. 240, and does not me-

1. (1881) 6 Cal 513.

2. (1881) 15 Cal 667.

rely amount to repairs: 29 Cal. 491 and 18 Bom. 517, Dist.

It is open to a Municipality to prosecute the owner of a house for "erecting" or "re-erecting" it without the former's permission along with a requisition for the removal or destruction of the portion constructed. The construction without sanction is an offence distinct from the failure to remove in obedience to the notice, and the fact that objections to the latter are pending is no bar to the initiation of a prosecution for the former. [P 6 C 1]

Petitioner applied to the Gaya Municipality for permission to replace the roof of the frontage of his house on pucca pillars in place of the wooden ones that had been destroyed by fire. The application was rejected for want of a plan. Petitioner applied afresh stating that in anticipation of sanction he had put up the pillars. This petition was also rejected and petitioner was served with a notice to remove the pillars built. The petitioner preferred objections to the notice for removal under S. 176, and while they were pending he was prosecuted for the unauthorized construction of the pillars:

Held: (1) that the building anew of the pillars, the balcony and the roof that existed before the fire was practically a re-erection of the front portion of the house; (2) that the Municipality was within the powers given to it by the Act in ordering the removal of the pillars and at the same time prosecuting petitioner for their construction.

[P 6 C 2]

Jayaswal—for Petitioner

Sultan Ahmad—for the Crown.

Judgment.—This is a petition against the order of Mr. N. R. Misra, Deputy Magistrate of Gaya, passed by him on 7th September 1916, convicting the petitioner under S. 273 (1), Bengal Municipal Act, 3 of 1884, and sentencing him to a fine of Rs. 10. The petitioner has come direct to this Court praying for a reversal of the said order of conviction and sentence. The facts appear to be as follows:

The petitioner has a certain house situated on the Railway Road in the town of Gaya and within the Municipality of Gaya. The front portion of his house caught fire and was burnt down towards the end of March 1916. As a result of the fire the roof of the front portion of his house fell down. On 1st April 1916 he applied to the Chairman of the Municipality of Gaya for permission to rebuild the front portion of his house. He wanted to replace the roof on pucca pillars in the place of wooden ones that existed before they were burnt. This petition was rejected by the Municipality on 6th April for want of a proper plan, which is required by the Municipal law to be annexed to such petitions. On 17th or 18th April he made another application to the Municipality repeating his prayer for per-

mission to rebuild the front portion of his house. In that petition he stated that he had already constructed four pucca pillars on the site of the old wooden pillars, as he thought that immediate construction of the pucca pillars was necessary to prevent another fire to his house. In this petition he says further that he constructed the said pucca pillars in anticipation of permission by the Municipality. This petition was also rejected by the Chairman of the Municipality on 16th May. In the meantime a notice, dated 11th April 1916, was served upon him by the Municipality on 15th April 1916 to remove the pucca pillars that he had constructed without the permission of the Municipality. This notice has not been produced or exhibited in the case, but the notice that was served upon the petitioner has been produced here by the learned counsel appearing for him and it is objected to by the learned Deputy Government Advocate, who opposes the applicant's petition for revision. In pursuance of that notice the petitioner preferred an objection to the removal of the pillars constructed by him. The objection was pending at the time the prosecution was started and has since been disposed of. The Vice-Chairman of the Municipality sanctioned the prosecution of the petitioner under S. 273 (1) of the Act and a complaint petition was accordingly filed by the Overseer of the Municipality. He was examined on oath on this complaint petition on 19th July and the accused was summoned to appear before the Magistrate, who after the trial of the case convicted him under S. 273 (1) of the Act. On behalf of the petitioner it is contended that the prosecution was started not under S. 190 (1) (a), Criminal P. C., but under S. 190 (1) (c) of the Code, and inasmuch as the conditions set forth in S. 191, in respect of prosecutions started under S. 190 (1) (c) were not fulfilled, the prosecution was without any jurisdiction. I do not see that there is any force in this contention of the learned counsel for the petitioner. As already stated above, the prosecution was started on the complaint of the Overseer who was a Municipal servant, and he was examined on oath by the Magistrate who took cognizance of the case. The prosecution was, therefore, initiated under S. 190 (1) (a). This contention is, there-

fore, overruled. The Magistrate, Mr. Misra, was empowered to take cognizance of offences under the Municipal Act.

Another technical objection has been taken to the validity of the prosecution. It is this. That the Vice-Chairman of the Municipality who sanctioned the prosecution under S. 353 of the Act was not empowered to do so by the Chairman of the Municipality, as is required by S. 45 of the Act. S. 353 of the Act requires that prosecutions under the Act shall be instituted only with the order or consent of the Commissioner. S. 44 of the Act authorises the Chairman of the Municipality to exercise all the powers vested by the Act in the Commissioners. The Chairman of the Municipality may by a written order delegate to the Vice-Chairman any duties and powers of a Chairman as defined in the Act, subject to such restrictions as may seem fit to him, and may at any time by a written order withdraw or modify the same: vide S. 45. Under S. 23 of the Act read with Sch. 2 of it the District Magistrate ex officio is the Chairman of the Municipality. Mr. Whitty, the District Magistrate of Gaya, was ex-officio Chairman of the said Municipality up to April 1916 and Mr. Hubback is the present Chairman of the Municipality. Mr. Whitty as Chairman of the Gaya Municipality delegated to the Vice-Chairman certain powers that he was empowered to exercise under S. 45 of the Act. This delegation was by means of a written order of the Chairman. Item 68 of the order is in respect of sanction to prosecute for any offence committed under the Bengal Municipal Act or any bye-law.

This written order of delegation was called for by the petitioner in the lower Court and was produced by the Vice-Chairman of the Municipality who has been examined in this case, but it was not exhibited and placed on the record. It was, however, as reported by the District Magistrate in his explanation, shown to the accused and his representative in the lower Court. It was contended in this Court that there was no such delegation of the powers of the Chairman to the Vice-Chairman by a written order as required by S. 45 of the Act. To meet this objection the Deputy Government Advocate has produced to-

day a written order of delegation. It is now conceded by the learned counsel for the petitioner that this order was produced and shown to his client in the first Court. There is no doubt that the Vice-Chairman of the Municipality has been empowered to give sanction for the prosecution of offences under the Municipal Act. It is contended, however, on behalf of the petitioner that this order of delegation is not valid as the Chairman of the Municipality, Mr. Whitty, who delegated the powers, ceased to be the Chairman of the Gaya Municipality at the time when the prosecution was started. It is urged that there should have been a fresh delegation of powers by the present Chairman of the Municipality and that the delegation given by Mr. Whitty has become inoperative. S. 45, however, says that the Chairman of the Municipality may at any time by a written order withdraw or modify the same. The Vice-Chairman to whom the powers were delegated continues to be the Vice-Chairman of the Municipality and was the Vice-Chairman at the time when he gave sanction for the prosecution of the petitioner. In my view so long as that delegation is not withdrawn by a written order of the Chairman who succeeded Mr. Whitty, the delegation will continue to be operative. I, therefore, hold that the sanction to prosecute has been properly given by the Vice-Chairman of the Municipality and that there is no substance in this contention also of the learned counsel.

The third ground of objection to the prosecution urged by the learned counsel for the petitioner is this: In pursuance of the notice calling upon the petitioner to remove the pillars he filed certain objections before the Municipality under S. 176. The said objections of his were not disposed of when the prosecution was started and hence the prosecution is bad. This again is a ground which does not commend itself to me to be tenable. The petitioner has been prosecuted under S. 273 (1) of the Act for having constructed the pucca pillars; in other words, for having begun to build or rebuild the house without having obtained the permission of the Municipality to do so. The petitioner commenced to build his house in anticipation of the sanction of the Municipality and had already constructed the pucca pillars. The Municipality served

upon him a notice to remove the pucca pillars under S. 238. The Municipality has also prosecuted him for having built those pillars without its sanction. It appears to me that the two courses adopted by the Municipality are within the powers given to it by the statute. The Municipality can require the pillars to be removed and also prosecute the petitioner for having built the pillars without the permission of the Municipality. If he fails to remove the pillars that would also be an offence under S. 271, and has nothing to do with the offence that was already committed by him, namely, the construction of the pillars without proper sanction of the Municipality. I, therefore, hold that the fact that the objection to the removal of the pillars was pending at the time the prosecution was started is no bar to the initiation of the prosecution.

The last ground taken by the learned counsel is that the construction of the pillars was only the repairing of the house that had fallen down and does not come under the words "erect" or "re-erect any house" under S. 240 of the Act. Learned counsel for the petitioner contends that the pillars were constructed exactly on the site on which the old pillars stood and therefore it was not any material alternation or enlargement of the building under that section. A reference to the two petitions for permission to the Municipality filed by the petitioner will show that the old wooden pillars with the balcony that stood on the pillars had been burnt down and the roof of the front portion of his house had fallen down. He wanted to build anew the pillars, the balcony and the roof that existed before the fire took place. He was, therefore, going to re-erect the front portion of his house. I do not for a moment doubt that rebuilding the pillars, the balcony and putting up the roof of the front of the house would not be simple repairs to the house. The entire frontage of his house had fallen down and surely the rebuilding of it would be the re-erecting of the front portion of the house in the literal sense of the word "re-erect." S. 238 of the Act requires that any person wanting to erect or re-erect a house shall take permission of the Municipality. The expressions "erect" or "re-erect any house" have been defined in S. 240 of the Act as including (a) any

material alteration or enlargement of any building, (b) such alternations of the internal arrangements of a house as effect an alternation of its drainage or sanitary arrangements, or affect its stability. The definition is by no means exhaustive as the word "include" in this section would show. Learned counsel has referred to the ruling reported as *Emperor v. Mathura Prasad* (1). In that case Mathura Prasad had made additions to his house by building a second story to his existing house. It was held that that was not an addition to the house and the conviction was set aside.

That was a case of reference by the Sessions Judge of Tirhoot where the opposite party, the Crown, was not represented. It appears to me that the attention of the learned Judges in that case was not drawn to the words "enlargement of any buildings" in Cl. (a), S. 240 of the Act. Besides, the Judges in that case seem to have thought that obstruction or encroachment on roads was necessarily connected with question of this kind. However, the facts of that case are quite different from the facts of the present case. In the case of *Emperor v. Mathura Prasad* (1), an addition to the house was being made by constructing a second story to the house. In the present case a portion of the house having fallen down was being reconstructed. I think that rebuilding of the front of the house consisting of the pillars, the balcony and the roof would constitute the re-erecting of the house, it may be on the same site. The ruling reported as *Krishnaji Narayan Pokshe v. Municipality of Tasagaon* (2), relied upon by the learned counsel for the petitioner, has no application as in S. 33, District Municipal Act 6 of 1873 (Bombay), the word "re-erect" does not occur. The petitioner began to re-erect the front portion of his house without obtaining proper sanction of the Municipality which as a matter of fact was refused. He has, therefore, contravened the provisions of S. 238 and was clearly liable under S. 273 (1), for beginning to build the house without such sanction. The conviction, therefore, is right. I decline to interfere with the order made by the Magistrate.

V.S./R.K.

Petition dismissed.

1. (1902) 29 Cal 491.
2. (1894) 18 Bom 547.

A. I. R. 1916 Patna 7 (1)

ROE AND JWALA PRASAD, JJ.

Harmanoge Narain Singh—Plaintiff—Appellant.

v.

Ganour Singh and another—Defendants—Respondents.

Second Appeal No. 1522 of 1913, Decided on 31st October 1916, from decision of Sub-Judge, Mozufferpore, D/- 17th February 1913.

Bengal Tenancy Act (1885), Ss. 19 and 20—Acquisition of occupancy rights during widow's life time cannot be questioned by reversioners.

Occupancy rights are not the creation of a zamindar or of the manager or of the temporary holder of an estate; any person cultivating lands in an estate acquires in time occupancy rights therein and the temporary holder can do nothing to prevent the acquisition of those rights save by evicting the occupancy raiyat by legal process. Any person holding in good faith as a cultivating raiyat, land under a temporary manager, proprietor or even lease-holder, would acquire occupancy rights therein after 12 years' cultivation. Hence occupancy rights acquired during the time when an estate was in the hands of a Hindu widow cannot be questioned by the reversioners after her death. [P 7 C 1]

D. N. Mitter and Baikuntha Nath Mitter—for Appellant.

Ganesh Dutt Singh and Baidya Nath Narain Sinha—for Respondents.

Judgment.—In this case the appellant is reversioner to an estate which was in the hands of a Hindu widow from the year 1876 up to the year 1904. During that period certain connexions of hers obtained a settlement of the parcel of land now in dispute as cultivating raiyats and have been recorded as holding occupancy rights therein. The appellant seeks to evict them, firstly, on the ground that the land in suit was zerait land of the estate and that, therefore, the respondents could not legally acquire occupancy rights therein; and secondly, that the widow had no authority to create occupancy rights in these lands.

With regard to the second argument, occupancy rights are not a creation of the zamindar or of the manager or of the temporary holder of the estate, any person cultivating lands in an estate acquires in time occupancy rights therein and the temporary holder can do nothing to prevent the acquisition of those rights save by evicting the occupancy raiyat by legal processes. It is certain that any person holding in good faith as a cultivating raiyat land under a temporary manager,

proprietor or even lease-holder would acquire occupancy rights therein after 12 years' cultivation.

With regard to the first point raised that the lands are zerait land, it has been found as a fact that they are not zerait lands, and we cannot go behind that finding unless it is shown that the appellants did not have a fair trial on this issue. It is suggested that they might have proved their case by means of a local inquiry, but we note that there was no application made for a local inquiry until after the evidence in the case had been completed. The appeal is dismissed with costs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 7 (2)**

ROE AND JWALA PRASAD, JJ

Debi Mahto—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 7 of 1916, Decided on 25th May 1916, against order of Dist. Judge, Saran, D/- 16th March 1916.

Criminal P. C. (1898), S. 476—Proceedings instituted as result of order under S. 476—Order appealed against—Proceedings should be stayed pending appeal.

Proceedings in a criminal Court initiated as the result of an order by a Court under S. 476 should be stayed pending the disposal of an appeal against the order or decree in respect of which the order was passed under the section. The Court to which the application for stay of proceedings is presented, should not prejudice the appeal by making any declaration as to the correctness or otherwise of the order appealed against to determine whether the prosecution should be postponed or not, but should leave it to the Court which has cognizance of the appeal, staying proceedings meantime. [P 8 C 1]

Rajendra Prasad—for Petitioner.

Judgment.—In this case one Debi Mahto applied for a succession certificate in the matter of the estate of one Raghubir Mahto. This certificate was granted ex parte, but upon the application of one Sadhu Mahto was subsequently revoked. In the course of proceedings upon Sadhu Mahto's application for revocation, the learned Judge found, not only that Debi's allegation that he was the nearest heir of Raghubir was not proved, but also that it was conclusively shown that Debi Mahto was not related to Raghubir in any way. He therefore ordered inquiry under S. 476 to be made and, on the result of that inquiry, directed the prosecution of Debi Mahto under Ss. 193 and 209.

Debi Mahto has filed an appeal to this Court, one of the grounds of the appeal being that the finding of the learned District Judge on the essential issue of fact was an erroneous finding. He now comes to this Court with a prayer that the proceedings in the Magistrate's Court at Saran in the matter of the prosecution of Debi Mahto be stayed pending the result of the appeal to this Court. No one appears against the Rule issued upon the District Magistrate. The District Magistrate has himself written showing cause why the application should not be granted. In the course of that letter he says that in view of the fact "that justice delayed means too often justice denied," and in view of the fact that there is a danger of Debi Mahto's tampering with the witnesses for the prosecution, this Court should not interfere with the present proceedings, unless it is patent upon the face of the record that the decision of the learned Judge is wrong. While fully sympathising with the learned Magistrate in his desire to dispose quickly of the cases in the Courts subordinate to him, we must point out that the point of view of the learned Magistrate is clearly a wrong point of view. It may be that this Court should not postpone a prosecution of this nature if it is satisfied that the finding of the District Judge is clearly right. But to make such a declaration would be to prejudge an issue which is likely to come before another Bench. That Bench may decide that Debi Mahto's story is true and that he is the nearest heir. Debi Mahto may succeed in his civil appeal and take out of a succession certificate, and also suffer rigorous imprisonment for having made an application to do so. We are not prepared to prejudge the issue by saying that Debi Mahto's appeal has no chance of success. We order that the proceedings against him under Ss. 193 and 209 be stayed, pending a final finding of fact by this Court. That this was the view taken by the District Judge is clear from the order made by him on 14th April 1916, in which he says that Debi Mahto, if he wishes the proceedings to be stayed, should appeal and obtain an order from the appellate Court staying proceedings.

We note that proceedings in regard to this matter have also been taken against Ambica Lall and Mahadeo Rai, on a charge of abetting the institution of a false proceeding under S. 209 read with S. 109.

We direct that this proceeding be also stayed pending the hearing of the appeal of Debi Mahto. We direct the Registrar to take such steps as may be necessary for expediting the civil appeal of Debi Mahto.

V.S./R.K.

Proceedings stayed.

A. I. R. 1916 Patna 8

ATKINSON AND KINGSFORD, JJ.

Babui Rita Kuer—Defendant—Appellant.

v.

Puran Mal—Plaintiff—Respondent.

Second Appeal No. 2368 of 1915, Decided on 7th August 1916, from a decision of Dist. Judge, Gaya, D/- 21st May 1915.

(a) **Hindu Law—Adoption—Custom of appointing daughter as son to raise issue is obsolete—Though such custom is established putrika will not be subject to all laws applicable to son.**

The custom of appointing a daughter as a son to raise up issue to a sonless father is now obsolete and can only be revived on the clearest and most conclusive evidence: 2 *I. A.* 163 (P C) and 31 *Mad.* 310, *Ref.* [P 9 C 2]

Even if such a custom is established the putrika will not be subject to all the laws applicable to the case of a Hindu son. [P 9 C 2]

A sonless Hindu father made over the whole of his property to his daughter by a deed of gift describing her as putrika and her descendants as putrika putra and heirs of the donor's present and future properties:

Held: (1) that the deed did not amount to an appointment of the daughter as putrika; (2) that even if the daughter became a putrika, she became joint with her father during his lifetime only if the property was ancestral, and then only would the joint property be available to discharge his debts. [P 10 C 1]

(b) **Deed—Construction — Recital cannot control operative part.**

A mere recital in a deed cannot cut down or abridge the clear and unambiguous words used in the operative part of the document itself. [P 10 C 1]

Saroshi Charan Mitter—for Appellant.

Gangadhar Das and Sivanandan Ray—for Respondent.

Atkinson, J.—The point for consideration in this case is, whether or not the judgment which has been given by both the lower Courts in favour of the plaintiff can be sustained. The action is brought by the plaintiff to recover a sum of Rs. 1,012, for clothing supplied to defendant 2's father, and the plaintiff has made defendant 1, mother of defendant 2, and defendant 2 herself, parties to the suit. It is well to observe at the outset that defendant 2 is not sued in her representative capacity; she is used only in her personal capacity; and it is in her

personal capacity that she is sought to be made liable in this action. The facts in connexion with the case are shortly as follows: Defendant 2 is the youngest daughter of her father, who was a sonless man, having had two children, both daughters. The eldest daughter married some six or seven years before the institution of this suit. To the second daughter, the youngest, her father and his wife were very sincerely attached; and in 1906, on 15th September 1906, the father executed and made over to this daughter by deed of gift certain properties which he had, to the value of about Rs. 24,000. It does not satisfactorily appear whether the property which was made over to defendant 2 was the self-acquired or the ancestral property of her father.

The pleadings themselves strongly go to show that it was his separate property. However, it would appear that in the deed there is a reference to some ancestral property having formed part of the property conveyed to defendant 2; but no details are given, and it is sought to make her liable personally, because she has acquired property under a deed of gift made by her father in his lifetime to her, which deed is not impeached on any ground of fraud by the father's creditors; and defendant 2 is sought to be made liable in respect of the property she so acquired. Babu Bhagwat Prasad Singh died in the year 1911. The main argument addressed to us is, that because this deed of 15th September 1906 contains a recital that the marriage of defendant 2 had taken place at considerable expense with the person named as the husband of the lady, and that as she was described as putrika, and her descendants as putrika putra and heirs of the donor's present and future properties, that thus defendant 2 was liable for her father's debts as if she were a natural son. It is contended that, because she was called putrika, in a sense she has become a natural son, and that, having acquired these properties, she is liable as a son to discharge her father's debts. We think that is not so. We have carefully considered the authorities, some of which were cited to us, but the most important of which were not referred to in the argument.

However, the case of *Thakoor Jeebnath Singh v. Court of Wards* (1), a Privy Council case, is important in this connexion.

1. (1874-75) 2 I A 163=23 W R 409 (P C).

The whole argument addressed to us is based upon the effect of this custom of adoption of a daughter as putrika. Now the Privy Council have laid it down that all Hindu text-writers unanimously concur in holding the appointment of a daughter as a son to raise up issue to a sonless father is now obsolete; and no recent authority can be found within modern times where the custom has received judicial sanction. In the Privy Council case referred to above a grave doubt is thrown upon the validity of such a custom, and it is there distinctly stated that if this custom is ever to be revived, it can only be on the clearest and most conclusive evidence. To a like effect is the case of *Sri Rajah Venkata Narasimha Appa Row Bahadur v. Sri Raja Suraneni Venkata Purushothama Jaganadha Gopala Rao Bahadur* (2), where the custom alleged is considered not to be a living custom. Mr. Mayne says at p. 93, Edn. 8, of his treatise on Hindu Law that the usage had become obsolete from time immemorial, and was so decided by the civil Courts. However if this custom or usage is relied on in any given case it must be conclusively and undeniably proved. I should be slow indeed to hold, if this obsolete custom can be established, that all the duties and obligations imposed on a Hindu son to discharge the debts of his father under Mitakshara law would apply or attach to a daughter appointed as a putrika to raise issue to a sonless father under this alleged custom.

However, in the present case, we are absolved from all difficulty, inasmuch as no proof has been given of the appointment of defendant 2 as a son to her sonless father. If such appointment is relied on, it must be established by legal proof. The deed of 5th September 1906 is a deed of gift; it does not contain a recital of the fact of any appointment of defendant 2 as putrika. The lower Courts seem to have held that the deed of 15th September 1907 itself constitutes the appointment of defendant 2 as putrika and that is the effect and legal purport of the deed. If it not a deed of appointment, it is referred to by both the lower Courts as being a deed of appointment; it is only a deed of gift by a father to his daughter during his lifetime. And if this deed is free of any intention on the part of the

2. (1908) 31 Mad 310.

parties to it to defraud creditors, it is a perfectly valid and legal document. No case is made or suggested that the deed is or was intended to defraud creditors. The possession of the property given by the deed passed to defendant 2, and she has been in enjoyment of the property since 15th September 1906. It is well to observe that the deed provided for the payment of the father's debts up to the date of its execution; and maintenance was charged upon the lands for a sum of Rs. 1,200 annually for the donor and his widow. The debt sued for is a debt contracted after the deed was executed, and the first item in the account charged shows that the first debit is dated 1st November 1906. By this deed of 15th September 1906, the donee is declared to be the absolute owner of the property. A mere recital in a deed cannot cut down or abridge the clear and unambiguous words used in the operative part of the document itself.

We, therefore, hold that this deed of gift was made by the donor with the clear object and intention of conveying to his daughter, defendant 2, as donee, the absolute estate and interest in the lands and property comprised therein, and that the donee acquired during her father's lifetime such property by way of gift, and not as assets after his death. It is suggested that if this appointment of defendant 2 as putrika took place, that then she became a son and joint with her father in the ancestral property, and thus liable to discharge his debts out of the joint property. This seems to us to be a fallacy. Even if the Mitakshara law did apply to defendant 2 as putrika, she would only become joint with her father during his lifetime if the property was ancestral, and then only would the joint property be available to discharge his debts. We do not think that you can graft upon the putrika all the laws applicable to the case of a Hindu son. Therefore, even though the ceremony of the putrika mantras may have been gone through, but there is no evidence of it, the essential necessary to establish defendant 2's liability has not been proved. Defendant 2 is not sued in her representative capacity; nor is it shown nor has it been alleged in this case that she acquired any assets of her father after his death. It may be, and I think that view would be right, that if defendant 2

did acquire assets of her father other than the properties comprised in the deed of 15th September 1906 that then she would be liable out of such assets to discharge her father's debts. But the case here is not one of that character; the case here is one seeking to make her liable because she acquired property by deed of gift from her father in his lifetime. For these reasons we think the judgment of the Court below was wrong in point of law. We shall allow the appeal, reverse the judgment and dismiss the action without costs.

Kingsford, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 10

CHAMIER, C. J. AND KINGSFORD, J.

Hari Prasad Misser and others—Defendants—Appellants.

v.

Kodo Marya and others—Plaintiffs—Respondents.

Second Appeal No. 2864 of 1914, Decided on 28th June 1916, from the order of Dist. Judge., Bhagalpur, D/- 22nd August 1914.

Transfer of Property Act (1882), S. 6 (e)—Decree directing ascertainment of mesne profits can be transferred—Civil P. C. (1908), O. 22, R. 10.

Plaintiffs 1 and 2, who obtained a decree (a) for possession of certain immovable property, and (b) directing an enquiry as to mesne profits, sold their right to recover mesne profits under the decree to plaintiffs 3 and 4. Subsequently all the four plaintiffs applied to the Court to ascertain the mesne profits. An objection was raised that the transfer of the right to recover mesne profits was invalid under S. 6 (e), T. P. Act:

Held: that the transfer was valid, the right of the original decree-holders being not a mere right to sue but a right to have the amount of mesne profits ascertained under the decree which had declared that they were entitled to mesne profits.

Held, further: that under the present Code of Civil Procedure proceedings taken to ascertain mesne profits are proceedings in the suit and not proceedings in execution, so that the assignees ought to have applied to the Court for permission to continue the suit under O. 22, R. 10, Civil P. C. but their omission to do so under the circumstances of the case, could not be held fatal to their right to continue the suit: *A. I. R. 1914 Cal. 60, Ref.*

[P 11 C 1]

Lalmohan Ganguly—for Appellants.

Naresh Chandra Sinha and Baikuntha Nath Mitter—for Respondents.

Chamier, C. J.—Respondents 1 and 2 obtained against the appellants a decree (a) for possession of certain immovable property, and (b) directing an enquiry as to mesne profits. Having executed their

decree for possession of the property they sold to respondents 3 and 4 their right to recover mesne profits under the decree which they had obtained. The two original decree-holders and their transferees then presented a petition to the Court of first instance praying that the amount of mesne profits due under the decree might be ascertained. In that petition it was stated that the original decree-holders had transferred their rights to respondents 3 and 4. Various defences were put forward and amongst them was a plea that the transfer of the right to recover mesne profits was contrary to law. That plea was overruled by the Court of first instance and also by the lower appellate Court. The only question which we have to decide in this second appeal is whether the decree for mesne profits was capable of being transferred. It is contended that the right which the decree-holders had under their decree was a mere right to sue within the meaning of Cl. (e), S. 6, T. P. Act. It seems to me that the right of the original decree-holders was not a mere right to sue but was a right to have the amount of mesne profits ascertained under the decree which had declared that they were entitled to mesne profits. The decree for possession and mesne profits was passed under the present Code of Civil Procedure and it is quite clear that under the present Code proceedings taken to ascertain mesne profits are proceedings in the suit and not proceedings in execution.

The decree-holders transferred to respondents 3 and 4 their right to mesne profits. It seems to me that if the respondents 3 and 4 had followed the procedure prescribed, they would have made an application to the Court under O. 22, R. 10, praying for permission to continue the suit, as assignees of the original plaintiffs decree-holders. No such application was made but an application was made by all four persons as above explained. The first Court made an order in favour of respondents 3 and 4 and must, I think, be taken to have allowed them to continue the suit as assignees of the original decree-holders. As a matter of fact no objection has been taken before us on the ground that the procedure prescribed by O. 22, R. 10, was not followed. The omission to make a formal application under R. 10 cannot be held to be fatal to the right of respondents 3 and 4 to carry on the proceedings. In my opinion what they ac-

quired was something much more than a right to sue. It was a right to carry on the suit in which a preliminary decree had been made and to obtain the mesne profits. I would confirm the decision of the Courts below. The view which I take is supported by the decision of the Calcutta High Court in the case of *Prasanna Kumar Panja v. Asutosh Roy* (1). I would dismiss this appeal with costs.

Kingsford, J.—I agree.

V.S./R K. *Appeal dismissed.*

1. A I R 1914 Cal 60=20 I C 685.

A. I. R. 1916 Patna 11

ATKINSON AND KINGSFORD, JJ.

Anand Ram Marwari and others—
Plaintiffs—Appellants.

v.

*Dhanpat Singh and another—*Defendants—Respondents.

First Appeals Nos. 60 and 204 of 1912, Decided on 3rd August 1916, from decisions of Sub-Judge, Bhagalpore, D/- 30th November 1911.

(a) **Transfer of Property Act (1882), S. 58 (a)**—Deed expressly called mortgage-deed and expressly hypothecating property charged as security for mortgage—Debt is valid mortgage debt.

The recitals in a mortgage-deed are important in considering the nature and the scope of the implied authority which arises as between the mortgagor and the mortgagee, when the mortgagor is allowed to remain in apparent possession and ownership of the mortgaged property.

[P 13 C 1]

A deed which is expressly called a mortgage-deed and expressly mortgages and hypothecates the property charged as security for the mortgage-debt, is a valid simple mortgage: 34 *All* 446 and 35 *Cal* 837, *Appr.*

[P 13 C 2]

(b) **Transfer of Property Act (1882), S. 58 (a)**—Person getting contractual benefit from mortgagor in possession must prove that it was benefit which he would derive in usual course of management.

While a mortgagor remains in possession after the date of a mortgage, he can deal with the property in the usual and customary way so as to bind the mortgagee, but he must not do anything prejudicially affecting the mortgaged property as security for the mortgage-debt: 17 *I C* 1, *Appr.*

[P 14 C 1]

The fact that a simple mortgage is executed by the manager of an estate rather limits than extends the ordinary rights of a mortgagor in possession.

[P 14 C 1]

Where a person gets a contractual benefit from a mortgagor in possession after the date of the mortgage, the onus is upon such person to prove that it was a benefit which he might derive and retain in the usual course of the management of the property.

[P 14 C 2]

(c) **Record of Rights—Entry in—Basis of entry can be inquired into by High Court.**

The High Court is entitled to examine and inquire into the grounds and basis upon which an entry in a Record of Rights was made.

[P 13 C 1]

P. R. Dass, Susil Madhab Mullick and Lalit Mohan Ghose—for Appellants.

Naresh Chandra Sinha—for Respondents.

Atkinson, J.—These are appeals by the plaintiffs from a single judgment of the learned Subordinate Judge dismissing their two suits against the defendants-respondents. In Appeal No. 60 the respondent, Dhanpat Singh, has been entered in the finally published Record of Rights as mukarrari tenure-holder in respect of 162 bighas of land at a rent of Rs. 31 odd. Lakhan Singh, who is respondent in Appeal No. 204, has been similarly entered as mukarrari tenure-holder in respect of two holdings of 54 bighas and 6 bighas, at rents of Rs. 16 and Re. 1 odd, respectively. Lakhan is the father of Dhanpat. The final publication took place on 31st October 1904. The plaintiffs prayed for a declaration that the defendants had no mukarrari right and they asked for an enhancement of rent under S. 30-A, Ben. Ten. Act. The Subordinate Judge held that the plaintiffs had failed to rebut the presumption attaching to the finally published Record of Rights and dismissed both suits. It appears that the original proprietor of this village was heavily involved in debt, and after his death the District Judge appointed a manager to supervise the estate on behalf of his two minor sons. Upon 8th July 1903 the manager appointed by the District Judge executed on behalf of the minors a consolidating mortgage charging the properties mentioned in the schedule to the bond with the principal sum of Rs. 6,400. And I gather that it was intended by this mortgage to consolidate all the debts then existing as against the property of the mortgagor. On 1st July 1905, the mortgagee instituted a suit upon the mortgage-bond of 8th July 1903, and he obtained a decree on 7th August 1905.

The plaintiffs in this action purchased the property in execution of that decree in March 1907. The final publication of the Record of Rights took place in October 1904, at a time when the property of the minors was under the care of the Court of Wards, under the provisions of

Act 8 of 1890. In 1902 the original proprietor brought a suit against Dhanpat Singh, claiming rent at a rate of Rs. 2-4-0 per bigha in respect of the holding held by him. In his written statement filed in that suit, Dhanpat alleged that he was holding 149 bighas at a rent of 4-annas per bigha, and he stated that the total rent for the 149 bighas was Rs. 37-4-0. But he did not assert in express terms that the tenure under which he claimed was mukarrari. In April 1903, the suit instituted by the zamindar was withdrawn, the plaintiff paying the defendants' costs, with liberty reserved to the plaintiff to institute a fresh suit; but this apparently was never done. Accordingly when the settlement proceedings were pending during the years 1903 and 1904, the dispute was again revived as between the tenant-defendants in this action on the one hand, and the zamindari interest upon the other. The estate, as I have said, was being managed at this time under the control and under the direction of the manager. Then it appears that in or about October 1903, at the time of attestation, the manager, on behalf of the mortgagor, filed a tannazza claiming to have the dispute, then existing between the estate on the one hand and the defendants as tenants upon the other, settled and adjudicated upon by the Settlement Officer.

At this time and before the matter could come before the Settlement Officer, the manager, purporting to act on behalf of the estate, called upon the defendants to show how they supported their claim to mukarrari. The only evidence which they adduced before the manager was valid receipts for rent running back for a period of seven years. Upon the examination of those receipts, and with no further or additional evidence, the manager assented or agreed that the tenants should be recorded in the Record of Rights in accordance with the claim put forward by them, namely, as mukarraridars holding the specified area of land at the rate of 4-annas per bigha. The main question in this case is, whether the agreement so arrived at between the manager and the defendants was a valid agreement binding upon the mortgagees, and the plaintiffs in this action as auction-purchasers, and the successors-in-title to the mortgagees. After the mortgage was executed the mortgagor minors remained on in posses-

sion by their manager of the mortgaged properties, with the assent of the mortgagees. The recitals in the mortgage-deed are very important in considering the nature and the scope of the implied authority, which arises as between the mortgagor and the mortgagee when a mortgagor is allowed to remain in apparent possession and ownership of the mortgaged properties.

I do not think in this case that any real question arises as to whether or not evidence was adduced in this action to rebut the presumption arising from the correctness of the entry in the Record of Rights. The main question seems to me to be, whether the basis upon which the entry that was made in the Record of Rights was founded upon a valid and legally binding agreement. We are entitled in law to examine and inquire into the grounds and basis upon which the entry in the Record of Rights was made. No evidence was adduced in this case by the defendants before the Settlement Officer to support their claim. It is conceded by the parties that the entry that was made in the Record of Rights was based either on a compromise agreement or an admission of the manager with the tenants, whereby the mortgaged property was blistered with a mukar-rari grant at a mere nominal rent in respect of a very large area of land. The main question for decision is, whether that agreement is binding as against the mortgagees and the plaintiffs in this action. Thus, on the argument before us, two questions arise for legal determination. First, whether the deed of 8th July 1903 is a mortgage in contradistinction to a charge. S. 58, T. P. Act, Cl. (a), defines a mortgage to be "the transfer of an interest in specific immovable property;" and Cl. (b) of the same section defines a simple mortgage in the following terms:

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage-money".

This deed which we have to consider does not expressly contain any words involving a transfer of any specific interest in immoveable property, but Cl. 6 runs as follows:

"That as a guarantee for the repayment of the principal amount with interest covered by this bond, as also law and private expenses, we hereby mortgage and hypothecate the properties mentioned below, and we further declare that until repayment of the debt covered by this bond, we shall not mortgage, transfer, execute by gift or any other kind of transfer in any way; and if we do, the same shall be void on face of this mortgage-deed."

In the case of *Dalip Singh v. Bahadur Ram* (1), the Chief Justice of this Court, then Chamier, J., laid down the three essentials constituting a simple mortgage as follows:

"In order that there may be simple mortgage, there must be (a) a transfer of an interest in specific immovable property, (b) a personal undertaking by the mortgagor to pay the mortgage-money, and (c) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold."

Now admittedly in the present case the conditions (b) and (c) have been fulfilled, but there is no express transfer of an interest in the property; and the learned Judge, in the case I have referred to, deals with a case such as the present and says:

"In a simple mortgage, the interest transferred is the right to have the property sold, and this need not be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred, then the requirements of condition (a) are satisfied."

To the same effect is the case of *Gobinda Chandra Pal v. Dwarka Nath Pal* (2). In an exhaustively considered judgment as to the distinction between a charge and a mortgage, the learned Judge in that case at p. 844 of the report says:

"If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage."

In our view, that being the law of India with regard to a simple mortgage, the requirements of the Statute in this case have been fulfilled; and this deed, which is expressly called a mortgage deed and expressly mortgages and hypothecates the property charged as security for the mortgage debt, is, according to the law of India, a valid simple mortgage. If the law of England were applicable, I think that this mortgage-bond would be held rather to be a charge by way of mortgage, than a simple legal mortgage. However, the law of India differs in this respect, and we feel ourselves conclusively bound to hold that the mortgage in the present

1. (1912) 34 All 446=15 I C 435.

2. (1908) 35 Cal 837.

case is a simple mortgage and not a charge. The second question arising for our consideration is the validity of the agreement made by the manager with the tenant defendant and upon which the accuracy of the Record of Rights depends. The mortgage-bond in this suit is a carefully prepared document. It is executed on behalf of the minors by the manager appointed by the Court under the direction of the Court and in pursuance of a Statute, and it sets out very fully the fact that this estate has been and is being managed by the Manager under the Court on behalf of the minors. I attach great weight to this fact, because it naturally would affect the mortgagees in considering the advisability of advancing their money on the security of the mortgaged property as to the nature and extent of the authority that such a manager would have to make contracts on behalf of the mortgagors while they remained in possession of the property after the mortgage money had been advanced. It seems to me that the fact that the manager was the person who executed the mortgage and is declared to be the manager of the estate, rather limits than extends the ordinary rights of a mortgagor in possession. No doubt, while a mortgagor remains in possession after the date of a mortgage he can deal with the property in the usual and customary way so as to bind the mortgagee; but he must not do anything prejudicially affecting the mortgaged property as security for the mortgage debt. I think the law on this aspect of the case is well summed up in the case of *Madan Mohan Singh v. Raj Kishori Kumari* (3), (at p. 388 of 17 C. L. J.) of the report, where Mookerji, J., says:

"It cannot, however, be maintained, as was pointed out by Romer, L. J., in *Reynolds v. Ashby* (4), that the mortgagor has anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from months to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land, or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage."

And he adds:

3. (1912) 17 I C 1.

4. (1903) 1 K B 87=72 L J K B 51.

"If there are any defendants who have obtained settlement from the mortgagor after the mortgage but before the commencement of the mortgage suit, they can resist the claim of the plaintiff, only if they can establish that the leases in their favour were granted on the usual terms, in the ordinary course of management; such a plea, if established,—and, it must not be overlooked, that the burden of proof in this matter is upon them—will furnish a complete answer to the claim of plaintiff."

That, in our view, is a correct summary of the law as to the relationship existing between mortgagor and mortgagee where the mortgagor remains in possession. And it is thus laid down and recognized that where a person gets a contractual benefit from a mortgagor in possession after the date of the mortgage, the onus is upon such person to prove that it was a benefit which he might derive and retain in the usual course of the management of the property. If the mortgagors had made this compromise or agreement with the defendants, instead of the manager, would it have been an agreement in the usual and customary course of management? I think not. Because the essence of this agreement is, that these defendants should be entitled to hold their respective holdings under a perpetual lease at a purely nominal rent; and more especially would this be unusual in the case of property such as the present one, which was mortgaged up to its eyes in debt. Could it be said that the making of any such agreement by a mortgagor in possession would not prejudicially affect the mortgagee's security; and would it be such an agreement as any prudent man would make in transacting his own business affairs, more especially when the claim of the tenants seems shadowy and uncertain? However, the manager of an estate under the Guardians and Wards Act has his duties defined and prescribed by the Act of the legislature. By S. 27 the guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would deal with it if it were his own, and subject to the provisions of the statute may do all acts which are reasonable and proper for the realisation, protection, or benefit of the property.

But these powers conferred by S. 27, are expressly limited by S. 29. By S. 29 a manager cannot mortgage without the previous permission of the Court, nor grant a lease of any part of the property for a term exceeding five years or for a term extending more than one year be-

yond the date on which the ward ceases to be a minor. What was the agent or manager in this matter doing? He was by an agreement recognizing the doubtful validity of a tenure which would operate against the mortgagees of the estate in perpetuity. On the most unsatisfactory evidence put forward by the tenants he accepted their contention, evidence upon which the settlement officer, had the case gone before him in the ordinary course, would have been bound to reject the claim put forward on behalf of the tenants, because they would not have brought themselves within the provisions of S. 50, Ben. Ten. Act, so as to be entitled to what might be called a statutory mukarrari. I ask, was that a prudent thing, or such as a reasonable man would do in the discharge of his own affairs, or with a view to the protection or benefit of the property? It was almost, in my opinion, making a gift of these 124 bighas of land at this nominal rent. But had the manager discharged his duty as he was bound to do, knowing that he was there as agent not only for the mortgagors, but also for the mortgagees with whom he had made the mortgage contract, he would have found three kabuliyats which would have completely negatived the case made by the tenants.

The first is dated 22nd August 1876, and the two following are dated 5th January 1887 and deal expressly with the property now in dispute and in possession of the defendants. And had the manager examined these documents—and they must have been within his reach or power of procurement—he would have found that the lands in question in this suit were held by these defendants' ancestors under these leases at a rent of Rs. 2-4-6, being the actual rent sued for in the rent suit instituted in 1903. These documents negative, conclusively negative, the case put forward by the defendants; and it would be quite impossible in the face of these documents to hold that when the manager made the contract he did with the defendants, he had materials before him upon which he could exercise a reasonable and satisfactory judgment as to the claims put forward by the defendants, having regard to the interest and duty which he owed to the estate. Therefore we think that the status of the defendants as recorded in the Record of Rights cannot be support-

ed, because it is made on foot of an agreement not legally binding upon the mortgagees and consequently not binding upon the plaintiffs in this action. The plaintiffs in this action are auction-purchasers; and they by their purchase have acquired all the interest of the mortgagor in the premises, and all the interest of the mortgagee in the premises as at the date of the mortgage.

Therefore we will decree that the relief sought in this action shall be granted; that the entry in the Record of Rights shall be cancelled, and the case must be remanded to the Subordinate Judge to determine what the enhanced rent of these holdings should be under the provisions of S. 30-A, Ben. Ten. Act. We award to the plaintiffs the costs of this appeal and costs in the lower Court.

Kingsford, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 15

JWALA PRASAD, J.

Radha Kishunji Takur—Defendant—Appellant.

v.

Lalji Saha and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 728 of 1916, Decided on 7th December 1916, from the decree of Dist. Judge, Monghyr, D/- 28th February 1916.

Landlord and Tenant—Occupancy right—Cosharer landlord purchasing holding in execution of rent decree and ousting mortgagee in possession—Suit by mortgagee—Plea of non-transferability cannot be raised.

It is not open to a fractional cosharer, who purchases a holding in execution of rent decree which only amounts to a money decree, to raise the question of non-transferability of the holding, as a defence to an action by a mortgagee whom he has ousted from possession, especially when the mortgagee has long been in possession and no objection has been taken by any of the landlords. 35 Cal 904, Dist; 15 IC 718, Ref.

[P 16 C 1, 2]

Muhammad Tahir—for Appellant.

Ragho Persad—for Respondents.

Judgment.—The appellant in this case was a fractional landlord of the land in suit. He brought a suit for recovery of arrears of rent against defendants 2 and 3 who are the tenants of the land, and obtained a rent decree. In execution of that decree he purchased the right, title and interest of defendants 2 and 3. As the decree under which the sale took place was that of a fractional landlord only,

the right, title, and interest of the judgment debtor passed and not the entire holding, as in the case of sale in execution of a rent decree by the entire body of landlords. The plaintiff-respondent was the usufructuary mortgagee of this holding from defendants 2 and 3 and had been in possession of the holding from 1889. The appellant, after his purchase, dispossessed the plaintiff from the land in suit in September 1912. The plaintiff has therefore brought this suit for a declaration of his title based on the usufructuary mortgage-bond executed by the father of the defendants 2 and 3 and for recovery of possession of the land in suit. Both the Courts below gave the respondent a decree for possession of the land. The defendant 1, has appealed to this Court. The lower appellate Court has held that the mortgage-bond in favour of the plaintiff is a genuine document and that the plaintiff was in possession of the land in suit on the strength of the bond till he was dispossessed by the defendant 1, in 1912.

This finding is not disputed in appeal by the learned vakil for the appellant. It is, however, contended by him that the lower appellate Court has omitted to decide the issue raised in the case regarding the non-transferability of the holding. The contention is that the holding of defendants 2 and 3 was not transferable, and hence the plaintiff, who bases his claim on the mortgage-bond from the predecessor-in-interest of defendants 2 and 3, has derived no title to the land, and, therefore, the suit for possession does not lie. Reliance is placed upon *Asmatunnessa Khatun v. Harendra Lal Biswas* (1). In that case the question about the non-transferability of the holding was raised by the entire body of the landlords, and not, as in this case, by a fractional cosharer and on that ground the case was distinguished in *Tulsi Singh v. Dayal Singh* (2). I do not think that it is open to the defendant 1, a fractional cosharer, who purchased the holding in execution of his rent decree which amounts to a money decree, to raise the question of the non-transferability of the holding. It is significant that the plaintiff was in possession of this holding, by virtue of the transfer from the predecessor of defendants 2 and 3, from the year

1889 and no objection was raised by the defendant 1 or by any of the landlords as to the non-transferability of the holding for such a length of time. In para 2 of the plaint some previous transfers also of this very holding have been referred to. All these facts and circumstances go conclusively to show that there is no substance at all in the contention of the appellant in this case regarding the non-transferability of the holding. The defendant 1, himself recognised the transferable nature of the holding when he bought it in execution of his own decree. There does not appear to be any merit in the contention of the learned vakil for the appellant regarding the non-transferability of the holding. I, therefore, agree with the lower Courts and dismiss the appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 16

JWALA PRASAD, J.

Surajnarain Singh—Plaintiff—Appellant.

v.

Mt. Sugra and others — Defendants—Respondents.

Second Appeal No. 3023 of 1914, Decided on 12th December 1916, against decree of Dist. Judge, Patna, D/- 22nd August 1914.

(a) Bengal Tenancy Act (1885), S. 73 — Scope.

Under S. 73, a landlord has a right to make both the tenant and his transferees jointly liable for the rent. [P 17 C 1]

(b) Civil P. C. (1908), O. 41, R. 33—Powers of appellate Court enunciated.

Under R. 33, O. 41, an appellate Court has power, in an appeal from a decree passed against one or more co-defendants to pass a decree against any or all of them. [P 17 C 2]

Ganesh Dutt Singh—for Appellant.

Abani Bhusan Mukerji and Baikanth Nath Mittra—for Respondents.

Judgment.—The plaintiff is the appellant in this case. The suit is for rent in respect of certain lands held by defendants 1 to 3 as tenants. There is no question as to the amount of rent claimed or as to the rate of rent. Defendants 4 to 14 are the ijaradars or the mortgagees of the lands in question from defendants 1 to 3, the original tenants. Defendants 4 to 9 compromised the suit with the plaintiff in the first Court. The suit was contested by the remaining defendants 10 to 14 as ijaradars of the disputed land. Defendants 1 to 3, the original tenants, filed

1. (1908) 35 Cal 904.

2. (1912) 15 I C 718.

written statements, but did not contest the suit at the hearing.

The relief sought in the plaint is for a decree for the amount in claim against all the principal defendants 1 to 14. The first Court gave a decree to the plaintiff against defendants 10 to 14, but dismissed the suit as against defendants 1 to 3. On appeal by defendants 10 to 14, the District Judge dismissed the suit of the plaintiff entirely, holding that although by the terms of the rehannamah or the mortgage-bond defendants 10 to 14 are liable to pay rent to the landlord, the agreement in the bond was not acted upon and hence defendants 1 to 3 the original tenants are alone liable for the claim of plaintiff.

The learned District Judge further directed that the plaintiff might bring a fresh suit against defendants 1 to 3, unless the claim was barred by limitation, but it is not clear from the judgment of the learned District Judge on what ground he did not give a decree against defendants 1 to 3 when he found that they were liable for the payment of the rent to the landlord. I see no reason why the plaintiff should have been driven to another suit and run the risk of his claim being barred. The plaintiff being dissatisfied with the decision of the learned District Judge has come to this Court in appeal.

Now defendants 1 to 3 are the recorded tenants of these lands. Defendants 4 to 14, who hold the lands under the ijara, are actually in possession of these lands and their right and possession have also been recognized in the survey khatian with the amount of rental entered against their names. Under the terms of the mortgage-bond they are liable to pay rent to the landlord. The liability to pay rent is not at all denied by the learned vakil who appears on their behalf, but what he contends is this, that they pay rent to defendants 1 to 3, and that defendants 1 to 3 in their turn pay rent to the landlord and hence the plaintiff has no right to bring this action for rent against them. I do not at all agree with this contention. The original tenants have transferred their lands to defendants 4 to 14, and under S. 73, Ben. Ten. Act, the landlord has a right to make both the tenants and the transferees jointly liable for the rent. Their liability to pay the rent is confirmed by the Record of Rights. I do

not see any cogency in the argument of the learned vakil for defendants 10 to 14 for allowing them to follow the circuitous method of payment of rent. Incident of the rent falls upon the defendants ijaradars who are in possession of the lands in suit and who have agreed in the bond to pay rent. The plaintiff-appellant is perfectly within his rights in bringing the suit against all the defendants, the original tenants and the ijaradars, and under S. 73, has a right to enforce his claim against all of them. His claim cannot be affected by dispute amongst the defendants inter se. I therefore hold that the plaintiff-appellant is entitled to a decree in this case against all the defendants jointly.

Under R. 33, O. 41, Civil P. C., the lower appellate Court was competent to give a decree against defendants 1 to 3, although the plaintiff did not prefer any appeal against the order of the first Court dismissing the suit against defendants 1 to 3. There was a conflict of decisions in the different High Courts regarding the power of the appellate Court in a case of this kind, but the conflict has been set at rest by the new provision in R. 33, O. 41, Civil P. C. The illustration to that section makes the meaning of the rule quite explicit. I therefore hold that this Court is competent to make a decree against all the defendants-respondents in this case for the claim of the plaintiff.

I accordingly allow the appeal, decree the suit of the plaintiff against defendants 1 to 3 and defendants 10 to 14 with costs throughout. The cross-appeal preferred by defendants 1 to 3 is dismissed.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 17

CHAMIER, C. J. AND SHARFUDDIN, J.

Karori Chand and others—Defendants—Appellants.

v.

Maharaj Bahadur Singh and others—Plaintiffs—Respondents.

Misc. Civil Appeal No. 410 of 1915, Decided on 10th August 1916, from an order of Sub. Judge, Hazaribagh, D/- 23rd July 1915.

Civil P. C. (1908), O. 39, Rr. 1 and 7—Temporary injunction restraining party from preventing applicant entering and worship-

ping in temples does not fall within O. 39, R. 1.

An application for a temporary injunction restraining the opposite party from interfering with the right of the applicants to worship in certain temples and their right to free access to the temples does not fall within the provisions of O. 39, R. 1. [P 18 C 2]

Ali Imam, S. Ashgar, K. P. Joyaswal, S. Anwar Yusuf, Susil Madhab Mullick and Hari Bhusan Mukerji — for Appellants.

Pugh and Bankim Chandra Mitter — for Respondents.

Chamier, C. J.—This is an appeal against an order of the Additional Subordinate Judge of Hazaribagh, rejecting an application made by the defendants in the suit for a temporary injunction restraining the plaintiffs from interfering with the right of the defendants to worship in the temples on the Pareshnath Hill and their right to free access to the temples, and also restraining the plaintiffs from making changes, alterations, or inscriptions in or on the temples or building walls round them. When the appeal was presented to the Calcutta High Court an application was made for the issue of an ad interim injunction. That application was granted and by an order of this Court dated 31st, May 1916, the injunction was to remain in force until 1st August 1916. The learned Judges who passed the order evidently thought that the suit would in all probability be disposed of by the Subordinate Judge by 1st August. When it was brought to notice yesterday or the day before that the ad interim injunction was spent, an application was made to us to hear the appeal as soon as possible and the appeal has been placed before us to-day although the records have not been received. I may say, however, that it was quite unnecessary to send for the records. Some of the allegations made by the defendants in their application for a temporary injunction, if established, would certainly have justified an order under one or other of the clauses of R. 7 of O. 39. For instance, it was alleged that the plaintiffs were in various ways creating in the temples evidence of their own possession to support the claim put forward by them. These allegations may now be disregarded, for it is common ground that all the evidence on behalf of the plaintiffs has been taken and only three witnesses remain to be

examined on behalf of the defendants. It is, therefore, unnecessary to consider the question whether an order should be passed under R. 7, O. 39. The defendants, however, insist that it is absolutely necessary that the plaintiffs should, pending the disposal of this suit, be restrained by injunction from interfering with the defendants' right to worship in, and to free access to, the temples.

The Subordinate Judge dismissed the application for an injunction on the ground that the case did not fall within R. 1, O. 39. The question in dispute between the parties is whether the Digambaris are entitled to worship in the temples managed and controlled by the Sitambaris without the permission of the Sitambaris and in a mode not approved by the Sitambaris. In my opinion the case does not fall within Cl. (a), R. 1, O. 39 and it certainly does not fall within Cl. (b) of that rule. If the defendants consider that the plaintiffs are interfering with their right to worship in the temples they may bring a suit and obtain an injunction restraining further interference. Both because I am of opinion that the application for injunction is not covered by R. 1, O. 39 and because under the present circumstances it appears to me to be unnecessary, even if that rule does apply, to issue an injunction at this state, I would dismiss this appeal and would order the appellants to pay the costs of the respondents. R. 877 is discharged. Hearing fee of the appeal will be five gold mohurs. No order as to the costs of the Rule which is discharged.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 18

MULLICK AND ATKINSON, JJ.

Ram Shai and another—Plaintiffs—Appellants.

v.

Kheman Mahto and others—Defendants—Respondents.

Second Appeal No. 1875 of 1915, Decided on 4th December 1916, from a decision of Judicial Commissioner, Ranchi, D/- 5th May 1915.

(a) **Chota Nagpur Tenancy Act (1908), S. 11—Scope.**

Section 11 applies to every transfer, whether effected before or after its passing and becoming law. [P 20 C 2]

(b) **Chota Nagpur Tenancy Act (1908), S. 11—Unregistered transferee cannot recover rent by legal process.**

A transferee of a tenure who is not registered in accordance with the provisions of S. 11, cannot recover rent from his tenants by process of law. He can institute a suit without being registered, but he cannot get a decree until the fact of registration is established. [P 20 C 2]

(c) **Chota Nagpur Tenancy Act (1908), S. 11—Acceptance of rent by superior landlord paid by tenure holder—Requirements as to registration cannot be presumed to be complied with.**

Where the transferee of a tenure pays or deposits into Court the rent due to the superior landlord or zemindar, and the latter accepts the rent so deposited, it cannot be presumed that the requirements of the law as to registration have been complied with: 7 I. C. 477, *Ref.* [P 20 C 2]

(d) **Chota Nagpur Tenancy Act (1908),—Record of Rights gives rise to mere prima facie presumption of correctness of entries therein.**

The Record of Rights under the Chota Nagpur Tenancy Act gives rise to a mere prima facie presumption as to the correctness of the entries therein, and that presumption may be destroyed by evidence showing that certain specific requirements of the Act have not been complied with. [P 21 C 1]

(e) **Interpretation of Statutes—Amending Act.**

In interpreting the provisions of an amending and consolidating Statute a Court may look into prior legislation on the subject, in order to find out the scope, object and intention of the later Act. [P 20 C 2]

Naresh Chandra Sinha—for Appellants.

Nagendra Nath Sen Gupta—for Respondents.

Atkinson, J.—This suit is brought by the plaintiffs as tenure-holders of the village of Muthadih to recover rent from the defendants' as tenants, for the years 1317, 1318, 1319 and 12 annas of 1320. The learned Sub-Divisional Officer dismissed the suit with costs, holding that the relationship of landlord and tenant had not been established as between the plaintiffs and the defendants. From that decision there was an appeal to the Judicial Commissioner of Ranchi, and the preliminary point was taken, as raised by para. 11 of the defendants' written statement, namely, that the plaintiffs were not registered in accordance with the requirements of the Chota Nagpur Tenancy Acts of 1879 to 1908 inclusive, and secondly, that the suit against the defendants in its present form, by reason of the non-registration of the plaintiffs as transferees of the tenure, could not proceed. The Judicial Commissioner acceded to the preliminary point taken, and affirm-

ed the dismissal of the suit. The transfer by which the plaintiffs obtained their title to the tenure in question was dated 28th May 1889. The Chota Nagpur Landlord and Tenant Act of 1903 required all transfers by way of succession, inheritance, sale, gift, mortgage or exchange to be registered in accordance with the requirements of S. 34, sub-S. 1. of that Statute. And Cl. 4 of that section provides that as to past transfers registration was to be effected within one year from the commencement of the Act, and as to future transfers within one year from the date of the transfer. The plaintiffs never discharged the obligation imposed upon them by that section of registering their transfer from 1889 up to 1903. They are not now registered transferees, as tenure-holders, of the village mentioned. The Chota Nagpur Tenancy Act of 1908 was passed and bears date 11th November 1908, and S. 11 replaces S. 34 of the prior Act of 1903 dealing with the registration of tenures. The Act is entitled:

"An Act to amend and consolidate certain enactments relating to the law of landlord and tenant and the settlement of rents in Chota Nagpur,"

Section 11, Sub-Cl. 1, is word for word the same as S. 34, Cl. 1, of the Act of 1903. It imposes a statutory obligation upon the transferee of a tenure to register his transfer in the office of the landlord to whom the rent of the tenure is payable; note the words in this Sub-clause—"the transfer". Cl. 4 of S. 11, of the Act of 1908 purports to correspond with Cl. 4 of S. 34, of the Act of 1903, and runs as follows:

"If any application for the registration of any transfer of a tenure or portion thereof is not made within a period of one year from the date of the transfer, and if the registration fee is not paid."

then the penalty provided by the Statute is to ensue, videlicet, that the tenure-holder's right to recover rent in a suit is suspended until the registration of the transfer is duly effected in accordance with the requirements of the Statute. It is contended in the able argument addressed to us by the vakil for the plaintiffs that the Act of 1908 repealed the Act of 1903, and that, inasmuch as the Act of 1908 does not expressly include, within the four corners of S. 11, a reference to antecedent or past transfers, that, therefore, his clients the tenure-

holders, the plaintiffs, are not affected by the law of Registration so far as the Act of 1903 is concerned. The learned vakil for the plaintiffs admits that his clients ought to have registered under the provisions of the Act of 1903, but that that Act has now ceased to exist, and has no operative effect and that the Act of 1908 does not apply to him, as his clients claim under a transfer which came into being antecedent to the passing of the Act of 1908, and that thus the action instituted by the plaintiffs for rent is maintainable.

Well, the learned vakil for the plaintiffs, I think, was taken a little aback by a reference to the Bengal General Clauses Act of 1899, S. 8, Cl. (c). That section seems to us to apply to and govern the present case in every detail. S. 8 says :

"Where this Act or any Bengal Act made after the commencement of this Act," videlicet 1899, "repeals any enactments hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactments so repealed."

Now the learned vakil admitted to me that undoubtedly under the Act of 1903 an obligation was incurred by his clients, the plaintiffs in this suit, to register their transfer. Then seeking to escape from the drastic provisions of the Bengal General Clauses Act of 1899, he says that a different intention can be gathered from the Act of 1908 so as to completely do away with the effect of S. 8, Cl. (c), preserving the prior Statute so far as the obligation it created is concerned. We see nothing in the Act of 1908 to show a different intention to that which this section of the General Clauses Act of 1899 was intended to preserve. The obligation was created under the repealed Statute during its currency and while it was the law, and nothing has taken place nor can anything be gathered from the later Act of 1908 to show an intention to destroy or to get rid of the effect of the obligation so incurred. And this repealed Statute of 1903 operates, qua these plaintiffs, in prohibiting them from exercising their rights of suing for rent, by reason of the provisions of the Bengal General Clauses Act of 1899.

Not only in that aspect of the case are the plaintiffs not entitled to recover, but we think that, construing these three Acts together, the Act of 1903, the Gene-

ral Clauses Act of 1899 and the Chota Nagpur Tenancy Act of 1908, the repealed Statute is in existence so far as these plaintiffs are concerned, until they have discharged their duty in having themselves registered. But I would go a step further and would say, that on the construction of the Act of 1908 itself, which is an amending and consolidating Statute, it appears that S. 11 applies to any and to every transfer. An authority has been cited to us of the decision of their Lordships of the House of Lords on the construction of Statutes. To the principle enunciated by their Lordships and with their express opinion we must respectfully concur, but I know of no rule of construction which prohibits any Court from looking into the prior Legislation which has been amended and consolidated by a later Statute, and from seeing what was the scope and object and intention of the later Act viewed in the light of the prior law. My own opinion is that S. 11 of the Act of 1908 applies to every transfer, whether effected before or after its passing and becoming law. So that, whether we take it on the interpretation to be given to S. 8, General Clauses Act, or upon the construction of the Chota Nagpur Tenancy Act of 1908 itself, in either event the plaintiffs cannot succeed in this action.

Two other arguments were addressed to us, to both of which it is necessary to refer because I think they were more or less an after thought in the mind of the learned vakil who presented them. The first was, that you could presume registration from certain acts, that is to say, that where a tenure-holder paid rent into Court, or deposited the rent in Court, which was the rent due to the superior landlord or zamindar, and the landlord accepted the rent so deposited, that from that you could presume that the requirements of the law had been complied with, and from that fact you could infer due registration. Well, I cannot follow that argument at all ; and the authority that was cited to support it, *Jugal Mohini Dasi v. Sri Nath Chatterjee* (1), in my opinion, in no way warrants any such decision. You must register with a defined person, at a defined place and for a specific purpose. Therefore we see nothing in this case at all from which any Court will be justified in holding that

by reason of the conduct of the parties the specific act of registration required by the Statute could or should be presumed.

The third argument, or at least the second branch of the same argument, is that the Record of Rights exists which has been prepared under S. 84, Chota Nagpur Tenancy Act of 1908, and that from the fact of the register being correct in form, we must presume that all its entries are correct, that the tenure-holders are correctly described as tenure-holders, the tenants as tenants, but that we are also to assume and presume that the tenure-holders are registered, when in truth and in fact they are not. The Record of Rights under this Act has no greater or more binding effect than the Record of Rights under the Bengal Tenancy Act. It gives rise to a prima facie presumption; but if it is admitted, as it is before us here, that these plaintiffs are not registered and never have been registered, then the presumption attaching to the Record of Rights is completely gone, because they are not registered within the requirements of the Statute. Therefore if from the Record of Rights it is intended to presume that they are registered, then the register is incorrect to that extent. Furthermore, the last argument addressed to us was that in Cl. 4, S. 11 of the Act of 1908 the words are :

"shall not be entitled to recover any rent which may have become due to him at any time."

Mr. Naresh Chandra Sinha contends that that means this :

"I am not registered but I can sue: I can go on and get my decree against the tenants; but because I am not registered I cannot execute the decree."

Well, there seems to be some authority for the proposition that you can institute a suit without being registered, but that you cannot get an effective judgment or any judgment unless you produce evidence of registration. That seems to be the trend of the decisions in Calcutta, and with that line of authority we entirely concur. But you certainly cannot get any decree until you establish the fact of registration, as the law prohibits the exercise of the legal right to recover rent until registration is complete—"recover" means to recover by legal process. We think having viewed the case in its entirety and having listen-

ed to the very able arguments which have been addressed to us, that the learned Judicial Commissioner was perfectly right in the view at which he arrived; but for different reasons we uphold his decision and declare that his decision in dismissing this action with costs in all Courts was right and proper. This appeal is dismissed with costs.

Mullick, J.—I agree.

V.S./R.K.

Appeal dismissed.

* A. I. R. 1916 Patna 21

JWALA PRASAD, J.

Radha Kant Misser and another—
Plaintiffs—Appellants.

v.

Jaladhar Jha and another—
Defendants—Respondents.

Civil Misc. Appeal No. 590 of 1915, Decided on 8th December 1916, from order of Dist-Judge, Darbhanga, D/- 11th September 1915.

* Civil P. C. (1908), S. 105, Sch. 2, Para. 3 and O. 41, R. 23—Award made within time fixed but filed beyond it is not illegal—Supersession of award affects merits of case and order of supersession amounts to decision on preliminary point.

The acceptance or supersession of an award affects the decision on the merits of the case.

[P 22 C 2]

There is nothing in the rules in Sch. 2, Civil P. C., on arbitration to show that an award would be invalid if not filed on or before the time fixed for the filing of it in Court. All that is required by R. 3, is that the Court must fix a time for the making of the award and an award would be valid if made within the time fixed, though not filed in Court on the date fixed for submitting the award to Court: 22 *Mad.* 22; 13 *Bom.* 119; 26 *All.* 105 and 27 *All.* 459, *Ref.* [P 23 C 1]

A case was referred to arbitration and 19th December was fixed for submitting the award to the Court. On that date the award was not filed and the Court superseded the reference, and proceeded to hear the case on the merits. The arbitrator signed the award at 7 p. m. on the same day and filed it in Court on 21st December. The Court, nevertheless, decided the case on the evidence. On appeal, the District Judge set aside the decree of the first Court and remanded the case under O. 41, R. 23, to be tried in accordance with the award:

Held: (1) that the order of supersession of the award was one affecting the merits of the case within the meaning of S. 105. (2) that inasmuch as no particular hour was fixed by the Court for making the award, it must be taken to have been made within the time fixed by the Court, notwithstanding that it was made after the rising of the Court. (3) that the action of the Court in superseding the award amounted to a decision on a preliminary point within the meaning of R. 23, O. 41, Civil P. C. and the order of remand by the District Judge was therefore correctly made: *A. I. R. 1914 Cal.* 163, *Ref.* [P 22 C 2, P 23 C 1]

Ajendra Narain Dutta and Saroshi Chundra Dutta—for Appellants.

Lachmi Narain Saha and Shiva Narain Bose—for Respondents.

Judgment.—The appellants in this case were plaintiffs in the original Court. They brought a suit for recovery of possession of certain lands in the Court of the Munsif of Madhubani. On 11th November 1914, the parties applied to the Court for reference of the case to the arbitrator named by them. The case was therefore, by the order of the Court, referred to the arbitrator, Babu Krishna Singh Thakur, with the request to submit his award positively by 19th December 1914. On 19th, December the award of the arbitrator was not filed in the Court nor any application made by him for time. The Court made the following order:

"The arbitrator has not submitted the award. He has not applied for time. The plaintiff has filed an objection also to the arbitration. Let the arbitration be superseded and the records be called from the arbitrator. Put up on 14th January 1915 for hearing."

On 21st December the arbitrator submitted his award and returned the record. Whereupon, the Munsif made the following order:

"The arbitrator submitted the award. The pleaders of the parties be informed, and put up on the date fixed."

The case was after some adjournments taken up on 11th February 1915, and the Court passed the following order:

"The defendant's pleader contends that the award submitted by the arbitrator was signed on 19th December 1914, that it was filed in the Court on 21st December 1914 and therefore, the award was valid and the arbitration ought not to have been superseded. But I find from the award that the arbitrator signed it at 7 p. m. on 19th December 1914, that is, after the order superseding the arbitration was passed. The arbitrator did not submit the award within the time allowed by the Court. The award was therefore invalid."

The Munsif ultimately, on 6th March 1915, decreed the suit in favour of the plaintiffs on the merits of the case, i. e., upon evidence given by the parties at the trial. The defendants appealed to the District Judge of Darbhanga who by his judgment, dated 11th September 1915, set aside the decree made by the Munsif and remanded the case to him with the direction that he considers the award and any objection that may have been made thereto within the period allowed by law. The learned District Judge held that the order of the Munsif superseding the arbitration was ultra vires, because as a matter of fact, the award was made on

the date specified in the Court's order and therefore, within the time fixed by the Court. The plaintiffs have appealed to this Court. It is contended by the learned vakil for the appellants that the order superseding the arbitration passed by the Munsif was final, inasmuch as no appeal was preferred against it by the respondents under S. 104, Cl. (a), Civil P. C., and hence it was not open to the District Judge in appeal to set aside the decree on account of any error, defect or irregularity in the order of supersession passed by the Munsif, inasmuch as the order of supersession did not affect the decision of the case, within the meaning of S. 105, Civil P. C. There does not appear to be any substance in the contention that the order of supersession of the award in this case does not affect the merits of the case. It is obvious that if the award was not superseded the Court was bound to pronounce judgment upon the award and to pass decree in accordance with the award. Therefore, the acceptance of the award or the supersession of the award affects the decision upon the merits of the case. The point seems to have been concluded by the decisions of all the High Courts, the leading case on the point is that of *Calcutta, Mothooranath Tewaree v. Brindabun Tewaree* (1). This case has been followed in *Damodar Trimbak v. Raghunath Hari* (2), *Achuthayya v. Thimmayya* (3), *Ram Jiwan v. Nawal Singh* (4), *Ram Autar Tewari v. Deoki Tewari* (5). The last case was decided on 11th February 1915 by Tudball and Chamier, JJ., (now Sir Elward Chamier, C. J.) and is the latest authority on the point. The learned District Judge was therefore, competent to set aside the decree of the Munsif on the ground that the order of supersession made by the Munsif was ultra vires. The first contention, therefore, of the learned vakil for the appellant is overruled.

The second contention on behalf of the appellants is that the award was not made within the time fixed by the Court and therefore it was invalid. The Court by its orders had fixed the 19th December for the submission of the award. The Munsif held that the award, as a matter

1. (1870) 14 W R 327.

2. (1902) 26 Bom 551.

3. (1908) 31 Mad 315.

4. (1908) 5 A L J 644.

5. A I R 1915 All 247=29 I C 411=37 All 456.

of fact, was made on the 19th December, but as it was made at 7 p. m. after the Court hours it was not made within the time fixed by the Courts. No particular hour was at all fixed by the Court for the making of the award and if the award was made on the date fixed by the Court it must be taken to have been made within the time fixed by the Court notwithstanding that it was made after the rising of the Court. It is then contended that as the award was to be submitted on the 19th December it was intended by the Court that the award should have been made by the arbitrator before the 19th. R. 3, Sch. 2, Civil P. C., is a complete answer to this contention. The Court is bound by the order of reference to the arbitrator to fix such time as it thinks reasonable for the making of the award and to specify that time in the order itself. There is nothing in the rules in Sch. 2, Civil P. C., on arbitration to show that an award would be invalid if not filed on or before the time fixed for the filing of it in Court. All that is required is that the Court must fix a time for the making of the award and an award would be valid if made within the time fixed though not filed in Court on the date fixed for submitting the award to Court. The learned District Judge is, therefore, right in holding that 19th December fixed for the submission of the award must be taken to have been fixed under R. 3 of the Schedule for the making of the award. This view is again supported by a string of rulings on the point. In *Ram Autar Tewari v. Deoki Tewari* (5) already referred to, the award was not filed until three days after the date fixed for filing but it was proved that the award was made within the time fixed for filing.

The award was held good and was enforced. Reference may also be made to the following authorities: *Arumugam Chetti v. Arunachalam Chetti* (6), *Umersey Premji v. Shamji Kanji* (7), *Sita Ram v. Bhawani Din Ram* (8), *Asad-ul-lah v. Muhammad Nur* (9). There is, therefore, no substance in the second contention also. The third ground taken by the learned vakil for the appellants is that the order of remand made by the District Judge was wrong, inasmuch as it

contravened the provisions of R. 23, O. 41, Civil P. C. The point urged on behalf of the appellants is that the Munsif had not disposed of the case on any preliminary point but had disposed of it on the merits and hence R. 23, O. 41, did not apply to this case. To my mind this would be taking a very narrow view of the word "preliminary point" referred to in R. 23, O. 41. The first and the foremost point before the Munsif was whether the award filed by the arbitrator was a valid one or not. If the award was found to be invalid or such as could not be acted upon then only the Court could deal with the case on merits, otherwise the Court was bound to give effect to the award and to give judgment and decree on the basis of the award. S. 3, Cl. 2, precludes the Court from dealing with the case when once it is referred to arbitration save as is provided in the rules in Sch. II. The first Court declined to go in to the merits of the award itself and disposed of the award on a preliminary ground that it was not made or filed within the time prescribed by the Court. If the Court had decided that the award was filed within the time and had not thrown out the award on the preliminary objection there would have been no necessity for the Court or the parties to go in to evidence at the trial of the case. The case has, therefore, been disposed of on a preliminary point as contemplated by R. 23, O. 41, Civil P. C. The appellate Court has set aside the order of the Munsif regarding the preliminary objection to the validity of the award.

The subsequent proceedings of the Munsif, that is, the taking of evidence and the passing of his judgment and decree in the case, all become null and void under R. 3, Sch. II, Civil P. C., and are set aside as a result of the reversal of the Munsif's order on the preliminary question as to the validity of the award. So the case of the defendants has been thrown out on a preliminary point by the first Court and the order of remand by the lower appellate Court was, therefore, within the powers given to it by R. 23, O. 41. In the second place even if the order of the Court below is not exactly in conformity with R. 23, O. 41, still it is an irregularity of the kind that cannot by itself vitiate the judgment of the District Judge, as held in *Nabin Chandra Tri-*

6. (1899) 22 Mad 22.

7. (1889) 13 Bom 119.

8. (1904) 26 All 105.

9. (1905) 27 All 459.

pati v. Pray Krishna Dey (10). In *Ram Anur Tewari v. Deoki Tewari* (5) already referred to in the earlier part of this judgment where the facts appear to be in all respects similar to the present case, a similar order of remand was passed. The Additional Judge set aside the order of the Munsif superseding the award, and the decree passed by him on evidence and remanded the case to the Munsif to consider the validity of the award. I, therefore, hold that the judgment of the District Judge is not bad on account of any defect in the order of remand made by him. The result is that the judgment of the Court below is upheld. This appeal is dismissed with costs.

V S./R.K. *Appeal dismissed.*

10. A I R 1914 Cal 163=20 I C 39=41 Cal 108.

A. I. R. 1916 Patna 24

ROE AND JWALA PRASAD, JJ.

Sew Prasad and others—Defendants—Appellants.

v.

Radha Mohan Sahay and others — Plaintiffs—Respondents.

Second Appeal No. 3380 of 1914, Decided on 14th December 1916, against order of Dist. J., Saran, D/ 6th August 1914.

(a) Evidence Act (1872). S. 32—Entries in account books—Writer not dead—Entries are inadmissible.

Entries in an account book are inadmissible in evidence under S. 32 if it is not proved that the person who made them is dead. [P 24 C 2]

(b) Evidence Act (1872), S. 32—Entries of payments by persons named in account book kept by deceased person are admissible to prove payments.

Semle.—Entries of payments of money made through named persons in an account book kept by a deceased servant in the ordinary course of his business are admissible in evidence to prove the payments under S. 32 but persons through whom the payments were made must be called to prove that the payments were in fact made.

[P 25 C 1]

Rajendra Pershat—for Appellants.

Harnarain Pershad—for Respondents.

Judgment.—The appellants in this case, who are mortgagees, are aggrieved by a decree made by the Court below for the redemption of property which has been in usufructuary mortgage for some 60 years. The pleas taken in the plaint were that the whole sum due upon the mortgage had been liquidated by the retention, in the hands of the mortgagees, of sums which the mortgagees had undertaken to pay as an annual quit-rent upon the property. The defendants-appellants

pleaded in reply that they had in fact paid the quit-rent regularly and in addition had paid large sums as cesses, with the result that not only had the mortgage not been redeemed but a considerable addition had been made to the sum due upon the mortgage. The lower Courts held as a fact that certain payments towards quit-rent alleged to have been made had not been made; that certain other payments said to have been made towards cesses had not been made and others had been made, and gave a decree for redemption to the plaintiffs on payment into Court of the amount found to be due to the mortgagees upon the account thus made up. The mortgagors have accepted this decree. The mortgagees have appealed on four grounds, firstly, that inasmuch as two of their number had transferred their interests to third party, who is not upon the record, the suit as a whole is not maintainable; secondly, that the payment of quit-rent might have been proved by entries in daily account books for 30 years and that those produced were admissible in evidence under S. 34, Evidence Act, without corroboration; thirdly that in any case whether S. 34 applied or not, it had been proved that the persons who made the entries in the books of accounts were dead and that the statements that these sums had been paid had been made in the account books in the ordinary course of business and were therefore, admissible in evidence under S. 32, and lastly, that the defendants should not have been directed to pay any part of the costs of the suit.

With regard to the first contention, the defendants have been in possession of the property mortgaged over 60 years and have never during this long period given notice to the mortgagor of the transfer of their interest in the property to a third party. Upon an examination of the facts the lower Court has arrived at the conclusion that the alleged transferees are not, and never have been, in possession of the property. In our opinion the lower Courts have arrived at the correct conclusion on this point. The second and third grounds may be dealt with together. The question is whether the account books are to be received in evidence. With regard to the "C" and "D" series, they purport to have been written and kept by persons of whose death there is no proof and they are therefore inadmissible under S. 32.

This reduces the accounts to be considered to Exs. A-1 to A-8. Assuming for the sake of argument that the deceased servant kept his master's accounts in the ordinary course of business, it is necessary to consider the nature of the statements of payments made in these account books. On an examination we find that the entries are of sums of rent paid through named persons. There is no evidence that any of those named are dead. It was clearly the duty of those who produced these account books to call the persons through whose hands these payments are said to have been made, to prove that the payments had in fact been made. Having regard to the above findings we are of opinion that the defendants-appellants were rightly directed to pay costs. The appeal therefore fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 25

ROE AND JWALA PRASAD, JJ.

Mt. Megha Koer—Defendant—Appellant.

v.

Deo Narain Rai and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2717 of 1915, decided on 18th December 1916, from a decision of Sub-Judge, Chapra, D/- 9th September 1915.

(a) Civil P. C. (1908), O. 5, R. 27—*Ex parte* decree cannot be set aside merely on ground of non-compliance with O. 5, R. 27.

A judgment-debtor against whom an *ex parte* decree has been passed cannot get it set aside by a separate suit merely on the ground that the provisions of O. 5, R. 27, were not complied with. [P 26 C 1]

(b) Decree—Setting aside—Fraud—To set aside *ex parte* decree deception on Court must be established.

In order to set aside an *ex parte* decree it must be shown that by a deception practised upon the Court it was prevented from arriving at a true appreciation of the merits of the case. [P 26 C 1]

Rajendra Prasad and Ambika Prasad Upadhyaya—for Appellants.

Mrityunjay Lal—for Respondents.

Judgment.—The plaintiff in this case was a peon in the Postal Department employed at Chapra. His home was in the sub-division of Sewan. He has a father, two adult brothers and a family. In 1907 he obtained a decree against some Mallahs who are defendants 2 to 4 in this action, and in execution of that decree bought up a holding standing in the

names of these Mallahs. On this holding the plaintiff's father was already a mortgagee in possession of a part. Prior to the sale at which the plaintiff purchased this holding, defendant 1 Sahadeo had taken a mortgage from the same Mallahs against this holding and six months later Sahadeo Rai brought a suit, to which the present plaintiff was a party, upon the basis of this mortgage and obtained a decree. In execution of that decree he purchased the property and took possession through the Court early in 1910. The plaintiff's case is that no attempt was made to disturb his actual possession of the land until the cold season of 1913-1914.

It appears that there were several disturbances during that year and it is the plaintiff's case that he came to know of the decree obtained by Sahadeo Rai in Aghan or Pous of that cold season. On 2nd February 1914 the plaintiff instituted the present suit for a declaration that the decree of Sahadeo Rai was obtained by fraud; that the auction-purchase must be held not to affect the rights of the plaintiff and that if the Court be of opinion that by the disturbances of Aghan and Pous the plaintiff ceased to be in possession of the land, it was asked that the plaintiff be restored to possession through the Court. The learned Munsif went carefully into the whole evidence and was of opinion that there was nothing on the record to indicate any fraud on the part of the defendants. It transpired, however, in the course of the trial that the service on the plaintiff, instead of being effected in the manner contemplated by O. 5, R. 27, was effected by hanging at the door of his residence. The learned Munsif found that this was merely an irregularity which might have been a ground for reopening the suit under O. 9, R. 13, and that there was no reason for setting aside the decree and the sale on the ground of fraud. The learned Subordinate Judge without touching upon the question of fraud decided that because there was this irregularity, the plaintiff's suit must be decreed and the plaintiff's possession confirmed.

Against that decree the defendant Sahadeo Rai's widow appeals. In view of the very sketchy judgment of the learned Subordinate Judge we have found it necessary to go through the whole of

the evidence on the record upon the question of fraud and having regard to the provisions of S. 114, Evidence Act, we have no hesitation in saying that there was practically no case of fraud for the defendants to answer. The peon and the identifier are both dead. The service return itself is so clear as to make it extremely probable that the statements made therein were substantially correct.

It is to the effect that the person to be served, Deo Narain Rai, was absent from his village on public service. It is mentioned that there was no male member of the family but only women and children in the house and that, therefore the notice was posted on the door of the house. The burden of proof was on the plaintiff Deo Narain to show that this service return was incorrect. There is nothing on the record to indicate that it was so. We are therefore of opinion that the findings of fact arrived at explicitly by the learned Munsif and by the learned Subordinate Judge by implication must be accepted and that this appeal must be regarded as being from a decision that where the provisions of O. 5, R. 27, are not complied with, the party upon whom service is to be effected is entitled to a decree that the decree made is not binding against him.

With this contention we cannot agree. It is admitted that the plaintiff became aware of the decree and sale in November or December 1913. The suit was not instituted until 2nd February 1914. At the time of the institution of the suit an application for re-hearing of the case under O. 9, R. 13, would have been time-barred. The question whether a suit brought to set aside a decree obtained ex parte should be entertained on grounds other than fraud has been fully discussed in the case reported as *Nanda Kumar Howladar v. Ram Jiban Howladar* (1), and indeed that case is a mere reiteration of a long series of decisions that the judgment in a former case must be regarded as final unless it can be shown that by a deception practised on the Court the Court is prevented from arriving at a true appreciation of the merits of the case. In the case before us there is no suggestion upon the record that any deception of any kind was practised upon the Court. The Court was aware that the peon was

a public servant. There was no attempt to deceive the Court. The provisions of R. 27 are permissive. The Court accepted the return made as sufficient proof of service.

The decree made by the Court must be held subject to an application under O. 9, R. 13, to be a good decree against the plaintiff. The suit was, therefore rightly dismissed by the learned Munsif. We allow this appeal with costs. The decree of the Subordinate Judge is discharged with costs and the decree of the Munsif restored.

v.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 26

ROE AND JWALA PRASAD, JJ.

Raghuraj Singh—Defendant—Appellant.

v.

Bishen Tewary and others—Plaintiffs—Respondents.

Second Appeal No. 1592 of 1915, Decided on 13th November 1916, from decision of Sub-Judge, Chapra, D/- 27th March 1915.

Civil P. C. (1908), O. 1, R. 8 — One co-owner can maintain suit on behalf of all for recovery of land against trespassers — Co-sharer.

Where a number of persons hold a joint interest in a cause of action and where the extent of the interest of each is an unspecified interest, it is open to any one of those persons to maintain on behalf of the whole body of interested persons a suit to establish the cause of action set forth and in the event of success of that one person all persons interested will enjoy the fruits of the litigation, unless there is some specific law forbidding such a procedure. Therefore, one of several co-owners can, on behalf of the whole body, maintain a suit for the recovery of the land against trespasser : 3 *Mad.* 234, *Foll.*

[P 27 C 1]

Saroshi Chandra Mitra and Baidya Nath Sinha—for Appellant.

Parmeshwar Dayal, Shambhu Saran and Anugrah Narain—for Respondents.

Judgment.—In this case upon the findings of fact arrived at by the lower Court, the only point on which the appeal can be argued is whether the plaintiff is entitled to sue, and if so, to what extent can he obtain relief. The facts are that the plaintiff, and defendants 4 and 5 who apparently have, apart from this suit, no joint interests with the plaintiff, purchased in execution of a decree the right, title and interest of one Dhanukdhari in the lands in suit. The extent to which the plaintiff was in-

1. A I R 1914 Cal 232=23 I C 337=41 Cal. 930.

terested in this purchase is not specified in the plaint. It is mentioned only that the purchase was a joint purchase. The lower appellate Court has found as a fact that the plaintiff and these two defendants are entitled by virtue of an auction purchase to take possession of the whole of the lands in suit and has, therefore, made a decree in favour of the plaintiff for such possession jointly with defendants 4 and 5. It is argued that inasmuch as defendants 4 and 5 have not made themselves plaintiffs in the suit and have asked for no relief, it is inequitable that they should be given possession with the plaintiff. And it is further argued that since defendants 4 and 5 cannot in equity obtain any share, it follows that the plaintiff cannot obtain any share inasmuch as he has failed to specify in the plaint the extent of his interest as separate from the interest of defendants 4 and 5.

We are of opinion that in these suggestions there is no force. The principle laid down in *Kanna Pisharody v. Narayanan Somayajipad* (1) is one which has been universally followed in the Courts throughout India. It is that where a number of persons hold a joint interest in a cause of action and where the extent of the interest of each is an unspecified interest, it is open to any one of those persons to maintain on behalf of the whole body of interested persons a suit to establish the cause of action set forth and that in the event of success of that one person all persons interested will enjoy the fruits of the litigation, unless there is some specific law forbidding such a procedure. There is no bar to the present suit in any codified law. Under the common law the plaintiff must be held entitled to bring on behalf of the whole body of persons interested a suit for the recovery of the land upon which the principal defendants are trespassing, and the whole body of those interested participate in the fruits of his success. The appeal must, therefore, be dismissed with costs.

V.S /R.K.

Appeal dismissed.

1. (1881) 3 Mad 234.

A. I. R. 1916 Patna 27

CHAMIER, C. J. AND SHARFUDDIN, J.

Padam Kumar—Plaintiff—Appellant.

v.

Nanhu Singh and others—Defendants—Respondents.

Appeal No. 117 of 1911, Decided on 18th December 1916, from Appellate decree of Dist. Judge, Shahabad, D/- 29th August 1913.

Evidence Act (1 of 1872), S. 21—Admission by executant of deed is admissible as evidence against his representative-in-interest.

Where the execution of a mortgage-deed is admitted and the deed contains a definite admission by the executants regarding the passing of consideration, the admission is evidence against the mortgagors and their representatives-in-interest under S. 21, Evidence Act. The burden of proving that the consideration was not that stated in the deed, lies upon the executants who admit the execution of the deed and it is for the Court to say whether they have proved facts sufficient to rebut the admission and to transfer the burden of proof to the other side : 7 W. R. 441, *Foll.* [P 28 C 1, 2]

Raghunath Singh—for Appellant.

Mrityunjay Lal—for Respondents.

Chamier, C. J.—This was a suit upon a mortgage made in 1896 in favour of the plaintiffs by defendants 1 to 4 and 8. Defendant 8 died shortly after the suit was instituted. It is asserted that defendants 1 to 7 are her legal representatives, but it is unnecessary to consider the correctness of this as the plaintiffs say that they will be content with a decree against the other defendants. It has been found that defendant 8 did not in fact execute the mortgage but was probably personated by some one else, and upon that it has been suggested that the mortgage never took effect. There is no force in this contention, for if defendant 8 was personated by another person it must have been with the knowledge of the other executants, and on the facts of the case it is impossible to hold that the mortgage was not intended to take effect if it was not executed by defendant 8. Defendants 9 to 14 are auction-purchasers of the mortgaged property. They say that they purchased in execution of a rent decree and were, therefore, entitled to annul and have in fact annulled the encumbrance. This question has not been considered by the lower appellate Court and this appeal must proceed on the assumption that defendants 9 to 14 did not purchase in execution of a rent decree.

The plaintiffs alleged that defendants 9 to 14 purchased as benamidars for defendants 1 to 8. The First Court did not discuss this question and the District Judge said merely, "there is not sufficient evidence on which to hold that they are benamidars." In the circumstances I do not consider that this is a sufficient finding on the question. The First Court dismissed the suit on the ground that the plaintiffs had failed to show that there was any consideration for the bond. The District Judge arrived at the same conclusion. In second appeal it is argued that the findings on the question of consideration should not be accepted, inasmuch as the first Court wrongly refused to enforce the attendance of defendants 1 to 4 and both Courts laid the burden of proof on the wrong party. It appears that the plaintiffs caused summonses to be issued to defendants 1 to 4 and that the summonses were duly served. On 17th May 1910, defendants 1 to 4 did not appear but the Court refused to issue warrants against them or to adjourn the case. Defendants 1 to 4 were obviously most important witnesses on the question of the consideration for the mortgage. In my opinion the Court should have taken steps to compel them to appear.

It seems to me that the second ground also has been made good. The mortgage was made to secure payment of Rupees 3,999 due from the executants to the plaintiffs on account of rent payable under a kabuliyat of October 1894. Defendants 9 to 14 admit the execution of the deed by defendants 1 to 4. The deed contains a definite admission by the executants that that amount is due. That admission is evidence against the mortgagors and their representatives-in-interest (S. 21, Evidence Act). If, as I now assume, defendants 9 to 14 have purchased no more than the interest of the mortgagor subject to the mortgage, they are representatives-in-interest of the mortgagors, the statement made by the mortgagors in the deed regarding the consideration is admissible against them, and the burden of proving that the consideration was not that stated in the deed lies in the first instance upon defendants 9 to 14, who admit the execution of the mortgage by defendants 1 to 4. I am aware that there has been a difference of opinion on the question whether such an admission may be proved against

the purchaser, whether by private treaty or at auction, of the interest of the person making the admission, but I see no reason to alter the opinion which I have expressed on this point in more than one reported case and which is supported by a number of cases beginning with the case of *Radhanath Banerjee v. Jodoonath Singh* (1). It is for the Court which deals with the facts to say whether the defendants have proved facts sufficient to rebut the admission and to transfer the burden of proof to the other side.

This case was instituted as long ago as June 1909 and it is much to be regretted that it cannot even now be disposed of. But it is clear to me that there has not been a proper trial of the case. I would allow this appeal, set aside the decision of the lower appellate Court and remand the case to that Court to be restored to the pending file and disposed of according to law. Costs of this appeal should be costs in the cause. As this case has been pending for an inordinately long time, the District Judge should record findings on all disputed questions of fact including the second issue so as to prevent the possibility of a further remand.

Sharfuddin, J.—I agree.

V.S./R.K. . *Appeal allowed.*

1. (1867) 7 W R 441.

A. I. R. 1916 Patna 28

JWALA PRASAD, J.

Govind Kandou and another—Plaintiffs
—Appellants.

v.

Wajid Ali and another—Defendants—
Respondents.

Second Appeal No. 2254 of 1915, Decided on 5th December 1916, from decision of Sub-Judge, Chapra, D/. 9th July 1915.

Civil P. C. (1908), O. 1, R. 3—Suit on specific mortgage—Mortgage not proved—Plaintiff cannot get decree on prior mortgage—Mortgage.

The plaintiff brought a suit for redemption against two persons on the basis of a particular mortgage. The specific mortgage set up in the plaint was not proved:

Held: that the plaintiff was not entitled to a decree for redemption in that suit on the basis of prior mortgages in favour of two defendant separately. [P 29 C 2]

Rajendra Prasad—for Appellants.

Parmeshwar Dayal—for Respondents.

Judgment.—This appeal arises out of a suit for redemption. The suit is based on a zarpeshgi-deed, dated 16th May

1910, executed by plaintiff for Rs. 275 in respect of 2 bighas 4 cottahs 19 dhurs of land for the years 1319 and 1320 faslis. The deed stands in the name of defendant 2, Sheikh Walayat Hussain, but it is alleged in the plaint that defendant 2 was only a farzidar and benamidar of defendant 1 Sheikh Wajid Ali, who is alleged to be the real mortgagee. The defendants filed separate written statements. Defendant 1 disclaimed all connexion with the bond in suit and denied that he had any interest in the bond in suit. He further stated that he was in possession of only 1 bigha 5 cottahs out of the disputed land under zarpeshgi-bonds (1) dated 27th May 1895 and (2) dated 7th June 1909. He also alleged that he holds a simple mortgage-bond dated 26th July 1903 from the plaintiff and that certain other sums are due to him on account of mahajini dealings with the plaintiff. Defendant 2, Sheikh Walayat Hussain, alleged that the zarpeshgi-deed of 1910, on the basis of which the suit for redemption has been brought was executed on account of fraud practised on him by the plaintiff, that it was never acted upon and was inoperative. He further said that he was in possession of one bigha out of the disputed land under a zarpeshgi-bond of 13th July 1899 for Rs. 100 and was not in possession of 2 bighas 4 cottahs 19 dhurs as alleged by the plaintiff and that he was not a farzidar of defendant 1. The first Court declined to give a decree for redemption on the basis of the bond in suit, but held that the plaintiffs were entitled to a decree for redemption on the basis of prior mortgage-bonds executed in favour of either defendants as their due dates had expired.

The Subordinate Judge in appeal held that the bond in suit was never given effect to and was inoperative and that the plaintiffs could not claim any benefit under it. He further held that the plaintiffs were not entitled to redeem the prior mortgages executed in favour of the defendants separately. He accordingly dismissed the suit of the plaintiff. The plaintiffs have therefore appealed to this Court and contend that the lower appellate Court should have allowed them to redeem the prior mortgages held by the defendants. The only question for determination is, whether or not the plaintiffs are entitled to redeem the property in

this suit on the basis of the prior mortgages in favour of the defendants. It has been distinctly held in this case by the lower appellate Court that defendant 2 is not a farzidar of defendant 1. The suit for redemption is in respect of 2 bighas 4 cottahs 19 dhurs of land. Defendant 1 holds only 1 bigha 5 cottahs out of this under separate zarpeshgi-bonds of 1895 and 1903 and has a simple mortgage-bond of 1903. Defendant 2 holds 1 bigha only under another zarpeshgi-bond of 1899. The bonds stand separately in name of the defendants and they have nothing to do with each other in respect of the bonds held by them. The plaintiffs have not got the same cause of action against these defendants, nor are they jointly, liable in respect of each and all of such causes of action.

The causes of action in respect of the several mortgage-bonds held by the defendants are distinct and independent of each other and do not arise out of the same transaction and cannot be joined in one suit against the two defendants in this case, who are not jointly liable in respect of each and all such causes of action—O. 1, R. 3, and O. 2, R. 3 (1), Civil P. C: *Umatrai v. Bharu Balvant* (1) and *Mullick Kefait Hossein v. Sheo Pershad Singh* (2). The suit for redemption is based entirely upon the distinct cause of action, expressly stated to have arisen on 30th Jeth 1321 fasli in respect of the zarpeshgi-deed of 16th May 1910. The plaintiff, having failed to establish his right to redeem the bond on the basis of which the suit was brought, should not be allowed to fall back on some other mortgage-bonds held by the defendants on which the suit has not been based: vide, *Krishna Pillai v. Rangasami Pillai* (3), *Sheo Prasad v. Lalit Kumar* (4), *Mullick Kefait Hossein v. Sheo Prasad Singh* (2), *Govindrav Deshmukh v. Ragho Deshmukh* (5). The earlier rulings of Madras High Court relied upon by the appellant. *Unnian v. Rama* (6), and *Hinde & Co. v. Ponnath Brayan* (7), are distinguishable and have not been acted upon by the same Court in *Krishna Pillai v. Rangasami Pillai* (3), already referred to. I

1. (1910) 34 Bom 358=8 I C 165.

2. (1896) 23 Cal 821.

3. (1895) 18 Mad 462.

4. (1896) 18 All 493.

5. (1884) 8 Bom 543.

6. (1885) 8 Mad 415.

7. (1882) 4 Mad 359.

therefore think that the learned Subordinate Judge is right in not allowing the plaintiff to redeem the prior mortgages held by the defendants in the suit. The appeal is therefore dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 30

MULLICK AND ATKINSON, JJ.

Chandrama Rai—Judgment-debtor—Petitioner.

v.

Maharaja of Dumraon—Decree-holder—Opposite Party.

Civil Revn. No. 156 of 1916 and Misc. Civil Appeal No. 246 of 1916, Decided on 5th December 1916, against decision of Dist. Judge, Arrah.

Bengal Tenancy Act (1885), S. 173—Application to set aside sale under S. 173 on ground of judgment-debtor purchasing benami is governed by Limitation Act (1908), Art. 181.

An application to set aside an auction-sale under S. 173, Ben. Ten. Act, on the ground that the judgment-debtor had purchased the holding benami in the name of a third person is governed by Art. 181, Lim. Act. [P 30 C 2]

Abani Bhushan Mukerjee—for Petitioner.

Parmeshwar Dayal and Krishna Saha—for Opposite Party.

Mullick, J.—The judgment-debtor's tenure was sold on 9th July 1915 in execution of a decree for rent obtained by the landlord, the Maharajah of Dumraon. On 15th September 1915 the present petitioner preferred an application to set aside that sale on various allegations of fraud and irregularity. It appears that the petitioner is the mortgagee in respect of one-third of the tenure for a principal amount of Rs. 999. He alleged that the sale was not only fraudulent, but that the purchaser was a benamidar for the judgment-debtor. The amount for which the tenure was sold was Rs. 100. The Munsif found that the sale was vitiated by fraud and irregularity, and he accordingly allowed the application. There was an appeal to the District Judge, who, disagreeing with the Munsif, found that there was no fraud and irregularity, and that the petitioner had been unable to show that through any act of the decree-holder or the auction-purchaser he had been kept out of knowledge of the sale for more than one month. He accordingly found that the petitioner's application which was made more than one month after the date

of the sale was barred by limitation under Art. 166, Lim. Act. It is admitted on behalf of the petitioner that there is no appeal against the learned Judge's order, but the learned vakil appearing before us on his behalf urges that he is entitled to come under S. 115, Civil P. C., on the ground that the learned Judge in the Court below has omitted to exercise jurisdiction, in that he failed to consider the allegation of benami purchase. If the allegation of benami purchase is well founded, then under S. 173, Ben. Ten. Act, the judgment-debtor is not entitled to purchase at the auction sale; and an application to set aside the sale is governed by Art. 181, Lim. Act, for which the period is three years from the date of the sale.

The learned Munsif at the end of his judgment finds that the auction-purchaser is closely related to the judgment-debtor, and that although he was present in Court when the plaintiff's allegations of benami were made he made no attempt to go into the witness-box for the purpose of proving the bona fide nature of the purchase. It is contended by the learned vakil appearing for the auction-purchaser before us that there is no finding by the Munsif that the purchase was in fact benami. It seems to me that the judgment of the learned Munsif is clearly to the effect that the purchase cannot have been otherwise than benami. Although the application is headed as one under O. 21, R. 90, Civil P. C., and although the judgment does not expressly give relief on the ground that the purchase was benami, I am quite satisfied that the Munsif means to hold that the auction-purchaser was no other than the judgment-debtor himself. It is true that the petitioner when he appeared as respondent before the District Judge did not take the ground that under S. 173, Ben. Ten. Act, he was entitled to the extended period of limitation provided by Art. 181. The reason for such an omission has not been explained to us here to-day, but upon the finding of the learned Munsif it was the duty of the learned District Judge when he threw out the petitioner's application on the ground of limitation to consider all the Articles which were applicable to the case, and clearly Art. 181, upon the finding as to benami purchase, was in the petitioner's favour and ought to have

been considered. That being so, the case must go back to the learned District Judge in order that he may consider whether or not the purchase was benami, and if so, whether Art. 181 brings the application within time. The order of the lower appellate Court will be set aside and the case remanded for decision according to law. The petitioner before us is entitled to his costs as against the two contesting opposite parties, namely, the zamindar the Maharajah, and the auction-purchaser; they will jointly pay him two gold mohurs.

V.S./R.K.

Case remanded.

A. I. R. 1916 Patna 31

JWALA PRASAD, J.

Jadunandan Sahay—Defendant—Applicant.

v.

Jung Bahadur Sahay—Plaintiff—Opposite Party.

Civil Revn. Case No. 133 of 1916, Decided on 13th December 1916, against the judgment of Sub-Judge, Chapra, D/- 26th April 1916.

Civil P. C. (1908), S. 115—Small Cause suit tried on original side—Defendant not objecting—High Court has discretion to interfere if justice demands in revision.

Where a Small Cause suit is tried on the Original Side, the parties not raising any question of jurisdiction in the trial Court, and an appeal from the decree of the latter Court is heard and decided by the District Judge, it is open to the High Court to look into the merits of the case and either to interfere or not to interfere with the decree of the lower Courts as the justice of the case may require; 21 Cal 249; 27 I C 972 and 25 All 135, *Rel on*; 26 Mad 176; 33 Mad 323; 25 Bom 417 and 34 Bom 171 *not Foll.* [P 32 C 2]

Harnarain Prasad—for Applicant.

R. L. Dutta, Sivasaran Lal, Rajendra Prasad and Tribhuan Sahai—for Opposite Party.

Judgment.—This is an application under S. 115, Civil P. C. The opposite party brought a suit for contribution against the petitioner in respect of Rs. 208, which the opposite party was obliged to pay to meet the cost for the preparation of paper books in certain appeals in the High Court in which both the petitioners and the opposite party were appellants. The petitioner was liable to pay to the plaintiff-opposite party half the costs for the preparation of the paper-books. The suit was instituted in the Court of the Munsif at Chapra and was valued at Rs. 135-6-0 principal with interest. The suit was

cognizable by a Small Cause Court under Sch. 2, R. 41, Provincial Small Cause Courts Act, 9 of 1887. Under S. 16, of the Act, the trial of the suit was barred by any Court other than the Court of Small Causes in the district of Saran. The Munsif has no power to try a Small Cause suit. He had no jurisdiction to entertain the suit or to try it. The petitioner-defendant did not, however, raise any objection to the suit being tried by the Munsif. The suit was tried by the Munsif on the Original Side, who gave a decree to the plaintiff for Rs. 25 only, (i. e.,) for a smaller sum than that claimed by the plaintiff. Both parties appealed. The appeals were heard by the Subordinate Judge of Saran, who by his judgment dated 26th April, 1916, decreed the appeal preferred by the plaintiff and gave a decree to him for the entire sum claimed by him. He dismissed the appeal preferred by the applicant.

The applicant does not challenge the finding of the lower appellate Court on the merits of the case. He, however, urges that the trial of the case by both the Courts below on the Ordinary Civil Side was without jurisdiction and hence the decree passed by the Court below should be set aside by this Court under its revisional powers under S. 115, Civil P. C. The only question is what order should the High Court make, assuming that the suit was of the nature cognizable by a Small Cause Court. There is a conflict of decisions of the different High Courts as to what should be done in a case of this kind. The Calcutta High Court, in *Suresh Chander Maitra v. Kristo Rangini Dasi* (1), where a suit cognizable by a Small Cause Court was tried both in the Munsif and the District Judge's Courts on the Ordinary Civil Side, without objection to the jurisdiction being made by the parties, held that S. 646-B, Civil P. C., 1882, modified the effect of S. 16, Provincial Small Cause Courts Act in such a manner as to make it incompetent for either party to plead want of jurisdiction of the Court which tried the suit. The Court further held that the High Court had full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial. This view was confirmed by

1. (1894) 21 Cal 249.

the Calcutta High Court in *Parameswari v. Jagat Chandra Das* (2). The Allahabad High Court, in *Ram Lal v. Kabul Singh* (3), where a case tried as a Small Cause suit was referred by the District Judge under S. 646-B, of the old Civil P. C., to the High Court for setting aside the decree of the Munsif on the ground that the suit was not cognizable by the Small Cause Court and that the Munsif who tried the suit had exercised a jurisdiction which was not vested in that Court by law, declined to interfere on the ground that the party had not raised any objection to the jurisdiction of the first Court to try the suit and had raised it for the first time before the District Judge, and hence there was no erroneous holding as to jurisdiction by the 1st Court.

There was a conflict of decisions in the Madras High Court. A Division Bench of the Madras High Court in *Ramasamy Chettiar v. R. G. Orr*, (4) declined to follow the Calcutta ruling in *Suresh Chander Maitra v. Kristo Rangini Dasi* (1), whereas another Division Bench of the same Court adopted the principles of the Calcutta ruling and declined to interfere in second appeal in a Small Cause Court case tried by the first Court and the District Court of appeal on their original side without any objection by the parties as to the jurisdiction of the Courts. The Full Bench of the same Court in *Kollipara Seetapaty v. Kan-kiptay Subhaya* (5), however, set aside the appellate Court decision in a Small Cause Court case tried by the first Court on its original side. The Full Bench declined to follow the Calcutta ruling in *Suresh Chunder Maitra v. Kristo Rangini Dasi* (1) and the Madras ruling in *Parameswaran Nambudri v. Vishnu Embrandri* (6) and went back on the ruling in *Ramasamy Chettiar v. R. G. Orr* (4). The Bombay High Court in *Shankarbai v. Somabhai* (7) and in *Maharana Shri Davlatsinghji v. Khachar Hamir Mon* (8) reversed the decree of the appellate Court on the ground that it had no jurisdiction to try an appeal of a case which was of a Small Cause Court

nature, although it was tried by the first Court under its ordinary jurisdiction. Following the principles of the decisions in the Calcutta and the Allahabad Courts, I hold that in a case like the present one, where the parties had not raised any question as to jurisdiction in the Court that tried the suit, it is open to the High Court to look into the merits of the case and either to interfere or not to interfere with the decree of the lower Courts as the justice of the case requires. If the Court has this discretion vested in it by O. 46, R. 7, Civil P. C., corresponding to S. 646, of the old Code, where the matter comes up to it in reference by the District Court, the High Court has surely power to exercise the same discretion to interfere or not to interfere, when the matter comes up to it under S. 115, Civil P. C., on the application of any party. Under S. 115 the Court's power is discretionary, as the word "may" in that section indicates. In the present case the parties did not object in the first Court to the suit being tried as an ordinary civil suit. The Munsif gave a partial decree, holding that the claim for the rest of the amount was barred by limitation. Both parties appealed to the District Judge. The learned Subordinate Judge who heard the appeals gave a decree for the entire sum claimed by the plaintiff.

The Subordinate Judge had Small Cause Court powers up to the value of Rs. 500 and had, therefore, jurisdiction to try the suit if it had originally been instituted before him on the Small Cause Court side. He had, of course, no jurisdiction to hear appeals from the decision of a Small Cause Court Judge. He heard the appeal from the decision of the Munsif as an ordinary appellate Court. From the judgment of the Subordinate Judge it is clear that he went thoroughly into the merits of the case and gave judgment after a careful consideration of the evidence on the record. The lower appellate Court has held that the parties had submitted to the jurisdiction of the first Court to try the suit without any objection and the petitioner was not prejudiced by the trial and hence it was not proper to throw out the suit at that stage. If the suit is thrown out at this stage by the High Court, the plaintiff's claim will probably be barred by limitation and the plaintiff will be left without any remedy. Having regard to the circumstances of

2. (1915) 27 I C 972.

3. (1903) 25 All 135.

4. (1903) 26 Mad 176.

5. (1910) 33 Mad 323=1 I C 543.

6. (1904) 27 Mad 473.

7. (1901) 25 Bom 417.

8. (1910) 34 Bom 171=4 I C 830.

the case and to the fact that there has been a prolonged trial of the suit in both the Courts below and that the litigation has been a protracted one and lasted for a number of years, it is not at all desirable in the ends of justice to interfere with the decree of the lower appellate Court under S. 115, Civil P. C., and to drive the parties to a fresh trial involving heavy expenses and waste of time. I, therefore, decline to interfere with the decree of the lower appellate Court and dismiss the application with costs, hearing fee one gold mohur.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 33 (1)

SHARFUDDIN AND ROE, JJ.

Jagabandhu Chowdhry—Appellant.

v.

Gorey Lal Chowdhry—Respondent.

First Appeal No. 138 of 1913, Decided on 18th April 1916, from decision of First Sub-Judge, Bhagalpur, D/- 13th July 1912.

(a) Civil P. C. (1908), O. 17, R. 1—Adjournment—Grant of, is within discretion of Court—Conduct of party should be scrutinised.

The question of granting time is always one of discretion and that discretion cannot be properly exercised until the general conduct of the party applying for time throughout the case has been scrutinized. [P 33 C 2]

(b) Civil P. C. (1908), O. 17, R. 1—Adjournment—Process fee should be paid within reasonable time—Otherwise Court need not grant adjournment.

When a date is fixed for a case, it is the business of the litigant to see that the processes for the attendance of witnesses are placed in the hands of the Court within reasonable time for securing their attendance upon the date fixed. If he chooses to file a process-fee only two days before the date fixed for hearing, any order passed by the Court for the issue of those processes must be understood to have been issued at the risk of the party in fault, and it is not for the Court to grant an adjournment when the case comes on for hearing. [P 33 C 2]

Khurshed Hasnain—for Appellant.

Atul Krishna Roy—for Respondent.

Roe, J.—This is an appeal against an order of the Subordinate Judge of Bhagalpur, refusing a petition for time put in by judgment-debtors in a proceeding for the making absolute of a decree upon a mortgage. Two grounds are taken in support of the appeal. Firstly, that the learned Subordinate Judge was wrong in taking into consideration the number of times the defendants had taken adjournments in the original suit upon the mortgage, and, secondly, because on 11th July,

two days before the date upon which the application for time was rejected, an order had been issued for the summoning of witnesses, the Court was wrong in proceeding with the case until the summonses had been issued and the presence of the witnesses secured. In the first of these contentions there is no force whatever. The question of granting time is one always of discretion and that discretion cannot be properly exercised until the general conduct of the defendants throughout the case has been scrutinized. It is clear, upon the face of the record, that throughout the proceedings the defendants have taken time far more often than parties genuinely interested in the defence of the suit should have been allowed to take. In the second point also it is clear that there is no force. When a date is fixed for a case, it is the business of a litigant to see that the processes for the attendance of witnesses are placed in the hands of the Court within reasonable time for the securing of their attendance upon the date fixed. If he chooses to file a process-fee only two days before the date fixed for hearing, any order passed by the Court for the issue of those processes must be understood to have been issued at the risk of the party in fault, and it is not for the Court to grant an adjournment when the case comes on for hearing.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 33 (2)

SHARFUDDIN AND ROE, JJ.

Amrit Mondal and others — Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Revn. No. 17 of 1916, Decided on 14th June 1916, against order of First Class Magistrate, Purnea, D/- 1st March 1916.

Criminal P. C. (1898), S. 526—Opinion of Judge on evidence in prior counter-case is not sufficient ground for transfer.

It is not a sufficient ground for the transfer of a criminal case that the Judge, in a former proceeding arising out of a counter-case, expressed certain views upon the evidence as to which of two versions was correct. Judges must be presumed to be upright men, who will approach a case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case.

[P 34 C 2]

Wasi Ahmad and Lalit Mohan Ghose
—for Petitioners.

S. Ahmad—for the Crown.

Judgment.—This is an application for the transfer of a trial pending in the Sessions Court at Purnea to the Sessions Court at Bhagalpur, on the ground that the accused has a reasonable apprehension that he will not receive a full consideration of his case in the former Court. The facts of the case are, that the accused were complainants in a case in which they alleged that there had been a riot on 4th November 1915. The complainants in that case were put on their trial before Mr. P. K. Gupta and were acquitted on the ground that it was not shown that there had been a riot on 4th November at all. The Public Prosecutor in the former trial opened his case with a statement that there had been two occurrences, one on 2nd November, and the other on 4th November, and whether the complainants in the case which he was opening (accused in the case now before us) were or were not guilty with regard to the occurrence on 2nd November, he strongly urged that the other side should be convicted for the occurrence on 4th November.

The learned Judge on hearing the evidence decided that there had been one occurrence only, on 2nd November, not on 4th November. The witnesses who gave evidence in that case, who will now be the accused in the present case, stated on oath that there was no occurrence on 2nd November. This story the learned Judge has disbelieved. The position is this: The Judge has not heard any of the eyewitnesses to the occurrence of 2nd November. He has no idea as to who was responsible for the disturbance of 2nd November or for the various injuries caused to the other side on that date, but he has not believed the statements on oath, made to prove that there was no occurrence on 2nd November, by persons who will afterwards make statements before him as accused persons. Upon this learned counsel for the petitioners urge that we should give them a chance before another Court of proving that there was no occurrence on 2nd November.

The basis of all such applications must be that the accused must have a reasonable apprehension that he will not receive a fair trial. The leading case upon the subject is that of *Asimaddi v. Govinda*

Baidya (1). The learned Deputy Government Advocate in showing cause is extremely anxious that the precedent in that case should not be destroyed by the first pronouncement made on the subject in this Court. The case has been followed in *Crown v. Kamil* (2), *Rajani Kanta Dutta v. Emperor* (3) and referred to and not dissented from in *Pandurang v. Emperor* (4) and *Emperor v. Hargobind* (5). We should be extremely sorry to depart in this Court from a principle which has been maintained throughout India. That principle is that the accused has no reasonable ground for apprehension that he will not have a fair trial, merely because the Judge in the former proceeding, arising out of a counter-case to the one now coming before him, has expressed certain views upon the evidence in the former case as to which of the two version is correct. The basis of that ruling is that Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. This view we are as anxious as the learned Deputy Government Advocate to uphold. We will not believe that our Judges are so easily prejudiced that, because one incidental part of the case before them has been decided in a previous case, they will shut their eyes entirely to anything that may be alleged in favour of the accused in a subsequent trial. We must refuse in the circumstances of this case to depart from the established practice of the Courts of India. The Rule is discharged. With regard to the application for bail in this case, it seems to us that the only serious injury inflicted was one upon the head of a boy with a lathi blow which has resulted in his death. Bail should be allowed to the satisfaction of the District Magistrate; such bail not to exceed Rs. 1,000 in each case.

V.S./R.K.

Rule discharged.

1. (1897) 1 C W N 426.
2. (1907) 1 S L R 37.
3. (1909) 36 Cal 904=3 I C 88.
4. (1902) 15 C P L R 192.
5. (1911) 33 All 583=12 I C 652.

A. I. R 1916 Patna 35 (1)

CHAPMAN AND ATKINSON, JJ.

Rajbans Sahay—Opposite Party—Appellant.

v.

Mahabir Prasad—Applicant—Respondent.

First Appeal No. 236 of 1913, Decided on 6th April 1916, from order of Dist. Judge, Gaya, D/- 18th March 1913.

Land Acquisition Act (1894), Ss. 11 and 12—Acquisition of land by Government—Compensation should be given to person in adverse possession and not to collateral of last male owner.

Where the question was whether compensation for land compulsorily acquired by Government should be awarded to the collateral heir of the last male owner, or to a person who had been in possession of the land for more than 12 years prior to the acquisition proceedings without payment of rent:

Held: that the latter was the person entitled to receive the compensation. [P 35 C 2]

Akbari and Khurshed Hasnain—for Appellant.

Judgment.—A plot of land was acquired for the purposes of the East Indian Railway Company on 23rd March 1912, and a certain sum of Rs. 580 odd was assessed as the compensation to be paid for the land. For this sum there were two rival claimants, Rai Mahabir Prasad and Rajbans Sahay. The plot was originally held by Rai Gudar Sahay. Rai Mahabir Prasad claimed to be the reversioner to the estate left by Rai Gudar Sahay who appears to have died in March 1897, leaving a widow and a daughter, both of whom are since dead. The other claimant, Babu Rajbans Sahay, claimed to have been the family mukhtear and to have been in possession of the plot rent-free. His case was that his father had been in possession before him. The finding of the learned District Judge, which is based apparently upon evidence common to both sides, is that Rajbans Sahay took possession of the property soon after the death of Rai Gudar Sahay during a dispute between the widow of Rai Gudar Sahay and Rai Gudar Sahay's daughter-in-law, Sahodra Koer. The respondent has not appeared, but upon the evidence offered on either side there can be no doubt that Rajbans Sahay had been in possession of the property for at least 12 years before 23rd March 1912, when the property was acquired, and that during that period he has paid no rent for it. He asserts now that the landlord's title

lies with Sahodra Koer. It is not clear when he first asserted this, but it is clear that he has been in possession for 12 years, and, therefore, Rai Mahabir Prasad had lost his right to recover possession from him before the land was acquired. At the time of the acquisition Rajbans Sahay appears to have acquired by adverse possession the title to hold the land without paying any rent for it. We are of opinion that the learned District Judge was wrong in awarding the full amount of compensation to Rai Mahabir Prasad, and we set aside that direction, and we direct that the amount be paid to the appellant Rajbans Sahay.

V.S./R.K.

*Appeal decreed.***A. I. R. 1916 Patna 35 (2)**

MULLICK AND JWALA PRASAD, JJ.

Judagi Raut—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 210 of 1916 Decided on 31st July 1916 from an Order of Offg. Session Judge, Muzaffarpur, D/- 6th June 1916.

(a) **Penal Code (1860), Ss. 147, 149 and 353—Accused assaulting amin deputed by Collector to relay boundaries under S. 45, Survey Act, is guilty under Ss. 147, 149 and 353, Penal Code—Bengal Survey Act (1875), S. 45.**

A decree-holder made an application to the Collector to relay the boundaries of certain lands under S. 45, Bengal Survey Act, regarding which there was a dispute and which had been previously surveyed and settled by a public survey. The Collector sent out an amin to do the work, but when the amin arrived on the land he was resisted by the accused and he and his men were assaulted with lathis. It was urged on behalf of the accused that the amin was acting without authority, as S. 45, Survey Act, was not applicable to the case:

Held: (1) that S. 45, Survey Act, is couched in the widest terms and all that it requires is that the Collector should be satisfied that a dispute exists in regard to a boundary settled in a previous public survey, and that, therefore, the deputation of the amin was legal; (2) that the accused were not entitled to resist the amin simply because the time which appeared upon his warrant had expired before he entered upon the lands; and (3) that the amin's proceeding being perfectly legal the accused in assaulting him and his party were guilty of offences under Ss. 147, 149, and 353, Penal Code. [P 36 C 1, 2]

(b) **Bengal Survey Act (1875), Ss. 45, 46 and 6—Amin in making demarcation of boundaries need not previously make proclamation under S. 6.**

Section 45, Survey Act, does not require that an amin in making a demarcation of boundaries should previously make a proclamation as required by S. 6 of the Act. The proclamation

required by that section refers only to a survey carried on under Ss. 4 and 5. [P 36 C 1,2]

Rajendra Prasad—for Petitioner.

Sultan Ahmad—for the Crown.

Mullick, J.—One Madho Lal obtained a decree against his lessees, the Kanti Indigo Factory, in respect of some lands in Mauza Dumaria. It appears that he apprehended trouble in obtaining possession and that the tenants in occupation of these lands were challenging his right to certain particular plots. He accordingly made an application under S. 45, Bengal Survey Act, alleging that there was a dispute regarding certain boundaries and that as the land had been previously surveyed and settled by a public survey he was entitled under S. 45, to ask the Collector to relay the boundaries. The Collector sent out an amin to do the work, but when the amin arrived he was resisted and two men belonging to his party were assaulted with lathis. The amin was also taken by the neck and thrown out of the land. It appears that a Civil Court Commissioner had gone at the same time to execute a Civil Court decree. He appears to have discreetly stood outside, but a garriwallah belonging to his party and other men went to the rescue of the Civil Court amin and were also assaulted with lathis. The present proceedings were then instituted, with the result that the petitioners before us have been convicted under Ss. 147 and 353 read with S. 149, I. P. C., to rigorous imprisonment for six months.

The present Rule was issued, firstly, on the ground that the amin was acting without authority and secondly, on the ground that the sentences were too severe. Now with regard to S. 45, Survey Act, it is urged that that section is not at all applicable. Now reading that section as it stands, it is quite clear that it is couched in the widest terms and that all that it requires is that the Collector should be satisfied that a dispute exists in regard to a boundary settled in a previous public survey. Those conditions were satisfied in the present case and, therefore, the deputation of the amin was perfectly legal. Then it is urged that the amin should have issued a proclamation before proceeding upon the land as required by S. 6, Survey Act. Now although the latter part of S. 45, states that an amin in making the demarcation shall have all the powers con-

ferred by S. 6, it nowhere says that he shall previously make a proclamation as required by that section. In my opinion, the proclamation required by that section refers only to a survey carried on under Ss. 4 and 5 of the Act. Then it is also urged that the amin showed a notice to the petitioners in which it was stated that the survey was to be completed by the 27th June 1915, and as the occurrence took place on 23rd December 1915 he had no authority to enter upon the land. The law apparently did not require the amin to show any notice to the petitioners. It appears to be a fact that the original time allowed was extended by the Collector and that the amin was within his authority.

The petitioners were not entitled to resist the amin simply because the time which appeared upon his warrant had expired. There is, therefore, no legal flaw in the amins proceedings. The only other consideration which has been pressed upon us is that the sentence is too severe, but having regard to the fact that the petitioners, were opposing not only the revenue authority but also the civil authority, I cannot admit that the sentences are too severe. It appears also that subsequently in February 1916 when the Civil Court did give possession to the decree-holder, it was necessary for the decree-holder to take the precaution of being accompanied by an armed police force. The proper course for the petitioners, if they were dissatisfied with the amin's proceedings or if they thought that in execution proceedings between the decree-holder and the factory to which they were no parties it was incompetent for the amin to demarcate their land, was to go to the Civil Court and to lay an objection. They certainly took a very great risk in attacking the revenue and the civil authorities simply for the reason that they were not parties to the original suit. Moreover so far as the amin was concerned, he could not possibly have given possession and the petitioners were in no way damnified by his acts. The result is that the conviction and sentences should, in my opinion, be affirmed and the application rejected.

Jwala Prasad, J.—I agree with the orders proposed by my learned brother.

V.S./R.K.

Rule discharged.

A. I. R. 1916 Patna 37

JWALA PRASAD, J.

Rudra Narain Singh and others—
Plaintiffs—Appellants.

v.

Maharaja Rameshwara Singh and others—Defendants—Respondents.

Second Appeal No. 3407 of 1914, Decided on 11th December 1916, against decree of Dist. Judge, Bhagalpur, D/- 12th August 1914.

Evidence—Admissibility—Batwara papers—Bengal Estates Partition Act (1897).

Batwara papers are not admissible in evidence against persons who were not parties to the batwara proceedings. [P 37 C 1]

Lal Mohan Ganguli—for Appellants.*Purendra Narain Sahe and Murari Prasad*—for Respondents.

Judgment.—The plaintiffs are the appellants in this case. They brought a suit in the Court of the Munsif of Bhagalpur for a declaration of their title to and for the recovery of possession over plots Nos. 488, 499, 502, 406 and 417 of the Record of Rights of Mouzah Deyalpur. These plots were recorded in the Survey Record of Rights as appertaining to the patti of the respondents in Touzi No. 726. The lands in question consists of parti and dabar lands. This is a suit in ejectment; the onus is upon the plaintiffs to prove their title to these lands. The entry in the Survey Record of Rights makes this onus heavier upon the plaintiffs, the presumption being in favour of the defendants. The plaintiff relies for his title upon certain batwara papers of 1877. The defendants were not parties to the said batwara proceedings and, therefore, these papers are not at all admissible in evidence against the defendants. There is no other document referred to in the judgment of the first Court or in that of the lower appellate Court, which could identify these lands as being within the patti of the plaintiff. The lower appellate Court has held that it is impossible to identify with absolute certainty these lands with respect to the ancient map of 1877. The plaintiff has, therefore, failed to prove his title to these lands. The suit is for recovery of possession and admittedly, therefore, the plaintiff is out of possession of these lands. The plaintiff has been found by both the Courts below not to have been in possession of these lands at all, at least not within 12 years of the institution of the suit.

It is contended on behalf of the appellants that the lands being parti, their possession should be presumed to be with the rightful owner of these lands and should go with the title to these lands. But when the plaintiff has failed to prove his title to the lands it is immaterial whether the lands are parti or cultivated lands or such as are capable of user and possession. It is then contended that the first Court had held that the title in these lands was with the plaintiff in 1877 and the lower appellate Court has not definitely recorded its finding upon the question of title, and the case should be remanded to the lower appellate Court for a definite finding as to the title of the plaintiff over these lands. The first Court, while holding that the lands appertained to the patti of the plaintiff in 1877 on the report of the Commissioner, had forgotten that the batwara map of 1877 was not admissible at all in this case and could not at all be used as evidence of title in favour of the plaintiff in this case. The finding of the first Court on this point is obviously based upon a misconception of the admissibility of the batwara paper, which is a sheet anchor of the plaintiff's case. The lower appellate Court, although it has not definitely recorded its finding as to the title, has sufficiently suggested in para. 1 of the judgment that it is not possible to identify these lands by a comparison with the map of 1877. This amounts to a finding against the title of the plaintiff. The appellants were called upon by me to state or to show if there was any evidence of title other than the batwara map of 1877 upon which the judgment of the first Court has been based. The learned vakil for the appellants has failed to do so. The first Court's judgment, relied upon by the appellants, clearly states that the plaintiff's title is based upon the batwara map of 1877. Upon the findings of the lower appellate Court and in view of the absence of any evidence of the plaintiff's title, it is idle to suggest that the ends of justice would be met by a remand of the case to the lower appellate Court. I, therefore, hold that the appellants have not been able to prove their case. I dismiss the appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 38

ROE AND JWALA PRASAD, JJ.

Mahadeo Rai—Defendant—Applicant.
v.*Kesho Pershad Singh Bahadur Dumraon*—Plaintiff—Opponent.

Civil Ref. No. 5 of 1916, Decided on 13th December 1916, made by Dist. Judge, Shahabad, D/- 8th March 1916.

Bengal Tenancy Act (1885), Ss. 3 (5) and 105—Holding declared kabil lagan—Landlord suing for damages for use and occupation previous to assessment of rent—Claim is for rent and not cognizable by Small Cause Court.

Where a holding was entered in the survey as kabil lagan and a rent was fixed for it under S. 105, Ben. Ten. Act, and the landlord sued the tenant for damages for use and occupation of the land previous to the assessment of rent:

Held: that the sum claimed was rent within the meaning of S. 3 (5), Ben. Ten. Act, and therefore the suit was not cognisable by a Small Cause Court. [P 39 C 1]*Sushil Madho Mallik and Uma Charan*—for Appellant.*Rai Krishna Saha*—for Respondent.

Judgment—This case comes before us on reference from the District Court of Arrah. The facts briefly are that the Dumraon Raj were plaintiffs in action for damages for use and occupation of land held by the defendant. These lands were entered in the survey as kabil lagan. A rent was fixed upon them in due course under S. 105 Ben. Ten. Act. For damages for use and occupation for the years previous to the proceedings under S. 105, the present suit was brought by the plaintiffs in the Small Cause Court, the period of limitation claimed by the plaintiffs being six years under Art. 120 of the Schedule. The plaintiffs set forth in their plaint that the defendant had been in occupation of the lands without any kasht-kari right with the permission of the Dumraon Raj since eight or nine years and that their possession over the said land was a permissive one. The defendant in his written statement contended that the decision of the Settlement Authorities that the land in respect of which damages had been claimed was kabil lagan was an erroneous decision. He reiterated the grounds taken in the proceedings under S. 105 that these lands formed part of his ancestral holding and that he was liable neither for rent nor for damages in regard to his occupation of them. He asserted also that since this was a suit between landlord and tenant, the sum claimed must be classed as "rent"

under the Bengal Tenancy Act and the suit was not cognizable by the Court of Small Causes. This objection was disallowed by the Small Cause Court Judge and the parties were directed to proceed to trial.

On this the defendant left the Court and the suit was decreed ex parte against him. The defendant then took the case before the District Court and asked for a reference to this Court under O. 46, R. 7, Civil P. C. The learned Judge has made the reference on the ground that as pointed out in the case reported in *Lalji Panday v. Berhamdeo Panday* (1), the suit was not cognizable by the Small Cause Court. It must be conceded at the outset that the case referred to is by no means on all fours with the present case. In that case the suit was one for damages under S. 156, Cl. 4, Ben. Ten. Act and it is distinctly set forth in the section itself that the damages to be awarded under the section are to be awarded as rent. Clearly, therefore, damages awarded under S. 156 are rent and the suggestion that a suit for such damages is cognizable by a Small Cause Court is untenable. The case before us is one of an entirely different character. If the sum claimed cannot be described as rent within the meaning of the Bengal Tenancy Act there is no bar to the trial of the suit in the Small Cause Court. Damages against a trespasser may be claimed in the Small Cause Court. The sole question for decision is a question of fact whether the defendant was a tenant or a trespasser. The written statement of the defendants, as I have stated clearly, claims a status as tenants under the plaintiff. In the plaint there is nothing that can be construed as a suggestion that the defendants were trespassers. The suit now before us is a suit by a landlord to recover damages from a tenant for failure to make an agreement with him to pay a fixed sum as rent during the period of his occupation.

If the defendant is a tenant and if the plaintiff is a landlord the sum now claimed is a sum payable on account of the use or occupation of land held by a tenant and is rent within the meaning of the Bengal Tenancy Act. The plaintiff is undoubtedly the landlord. The defendant claims to be the tenant and is described by the plaintiff as holding under

permission. That to my mind is indistinguishable from the position of a tenant. I would, therefore, set aside the decree made by the Small Cause Court and would direct that the plaint be returned to the Court having jurisdiction to try the suit. The plaintiff will pay the costs of this reference. Hearing fee two gold mohurs.

V.S./R.K.

Decree set aside.

A. I. R. 1916 Patna 39

MULLICK AND ATKINSON, JJ.

Baluk Chand Lal and another—Decree-holders—Appellants.

v.

Nathuni Singh and another — Judgment-debtors—Respondents.

Second Appeal Nos. 248, 261, 262 to 265 of 1915, Decided on 20th November 1916, against order of Dist. Judge, Patna, D/- 16th April 1915.

(a) Limitation Act (1908), S. 14—Injunction restraining execution — Period during which injunction is in force is to be excluded.

Where a decree-holder is restrained from executing his decree by an injunction issued by a Court in a suit to set aside that decree, the period during which the injunction is in force should be excluded in computing the period of limitation within which the decree must be executed.

[P 40 C 2]

(b) Limitation Act (1908), S. 19—Pleading of statute of limitation.

The pleading of the Statute of Limitation is not a denial per se of an alleged payment or acknowledgment.

[P 41 C 1]

(c) Limitation Act (1908), S. 19—Payment made as acknowledgment — New cause of action springs from payment.

The Statute of Limitation only deals with limitation as a bar to the original action, but if a payment be made by way of acknowledgment on foot of the general debt, then a new cause of action springs from that payment and limitation begins to run afresh.

[P 41 C 1]

(d) Practice—Pleadings.

A petition for leave to execute a decree is not a pleading.

[P 41 C 1]

Chandra Sekhar Prasad Singh—for Appellants.

Guru Saran Prasad—for Respondents.

Atkinson, J.—The appellant in this application for leave to execute a decree is a landlord, who obtained from the Collector of Barh an account or decree under the provisions of Ss. 69 and 70, Ben. Ten. Act. The jurisdiction of the Collector was invoked by the landlord or the zamindar under these sections to ascertain by way of appraisement the rent which he was entitled to be paid by his tenant, the defendants, and accordingly the Collector,

in pursuance of his duty in that behalf, by his order or decree dated 3rd May 1911, made an award showing that the appellant in this application was entitled to be paid by his tenants a certain fixed sum of money. The tenants, of course, had a perfect right to appear before the Collector, and to advance on their own behalf whatever arguments, either in law or on the merits, they might have been advised to put forward. All I do know is, that the statute gives to the order of the Collector a statutory sense of finality because that order is declared to be final, and therefore, I take it that it is beyond dispute that if the officer making the order had jurisdiction, that he then acting within that jurisdiction is the final Tribunal to deal with the merits and to make an order thereon. And from such order, in my opinion, no appeal lies, nor is it open to the persons against whom the order is sought to be executed to assail the Collector's order so far as the merits are concerned.

Section 70, Cl. 5, provides that the order of the Collector is to have the force of a decree, and shall be enforced as a decree. Of course the Collector has no machinery to enable him to execute his order or to give effect to it as a decree; and accordingly the Collector's order or certificate is sent forward to the civil executing Court for its due execution according to law. And it appears that the decree-holder applied, as he was entitled to do, under S. 70, Cl. 5, Ben. Ten. Act to the Collector for a certified copy of his order for the purpose of transmitting it to the civil Court for execution, and I believe from the observations of the learned Judge who decided this case on appeal, that the order of the Collector was taken by the decree-holder physically and brought to the officer of the civil Court for due execution. When the decree came before the executing Court for execution the tenants seemed to conceive that they had some grievance, and whether or not they applied to stay the execution, I do not know, but I do know that in January of the year 1912 the tenants brought an action to set aside the Collector's order of 3rd May 1911, which was the order then being sought to be executed.

The case which was started by the tenants in 1912 dealt with six distinct cases, namely Nos. 248, 262 to 265 inclu-

sive, and 261 makes up the sixth case. Different considerations apply to No. 261 from those attaching to the remaining five cases. But on the application of the tenants on 5th February 1912 I find that an order was made by the Munsif injunctioning the appellant here, the decree-holder, from executing his decrees until the action the Munsif was to try to set aside the Collector's order or decree, had been disposed of. The Munsif pronounced a decree in that suit on 21st May 1913 and by that decree the order of the Collector, dated 3rd May 1911, was set aside. From that order of the learned Munsif the decree-holder appealed, and on 2nd February 1914 the appeal was decided, reversing the order of the Munsif and establishing again the decree of the Collector.

It appears that in the course of giving judgment in that case the District Judge, who decided the appeal, stated that all matters that the defendants wished to urge against the order made by the Collector might be raised and discussed on the hearing of the decree-holder's application to execute the order or decree of the Collector, and that then a separate suit to set aside the Collector's order was unnecessary. Of course, if the learned District Judge stated so, he obviously was in error; but from that erroneous decision of the learned District Judge no appeal was taken by the tenants by way of second appeal or otherwise and, as far as I can see, although the tenants may have been misled by the decision of the learned Judge, they acquiesced in his misleading judgment, and I do not think that that fact justifies this Court now in doing what it can to enable these tenants to fight these cases on the merits for a second time, if they have not thought fit during the earlier stages of the litigation to avail themselves of the right which undoubtedly they had. Thus, between 5th February 1912 and 2nd February 1914 an injunction was granted affecting the cases Nos. 248 and 262 to 265 inclusive, and during that period of time the decree-holder, the appellant here was precluded from taking any step whatsoever to execute the Collector's decree or order. The decree-holder, the appellant here having applied on 27th July 1914 by petition for leave to execute his decree, the point is immediately taken:

"Oh, you have not sought to execute your decree within three years from its date, namely,

within three years from 3rd May 1911, and thus you are barred by limitation."

The obvious answer, so far as the five cases Nos. 248 and 262 to 265 are concerned, is that in respect of those cases he was injunctioned for the period of two years from attempting to execute his decree; and it would be not only unjust, but grossly unfair to say that that period of two years was to be counted in limitation against the decree-holder, when the Court, who had seizin of the execution matter, pending the disposal of the tenants' suit to set aside the decree, did not take steps to protect the decree-holder's rights and interest. But the learned vakil, who argued on behalf of the respondents in this appeal, said, "Oh, this injunction only continued till the pronouncement of the Munsif's decree." Well, though I do not myself agree with that contention, yet I take it for the purpose of argument to be correct, and I find that if that be the period of time when the injunction became dissolved, that then forsooth, one year and four months would have to be allowed. And therefore, the argument of the learned vakil is in favour of an extension of the limit of time, and if that period be allowed it would then bring this application, which was made on 27th July 1914, within time. Accordingly, whether the question be considered, so far as the five cases mentioned above are concerned, either upon the argument of the learned vakil for the respondents, or upon the true construction of the order granting the injunction of 5th February 1912, or upon the construction to be put upon S. 14 of the Statute of Limitation, I am of opinion that the respondents' contention must fail in these five cases, and that limitation of time has not run so as to bar the decree-holder from executing his decrees in the present cases.

Suit No. 261 is apparently on a different footing. In the petition of 27th July 1914 seeking leave to execute the decrees, averments were made by the petitioner, who was the decree-holder, that the tenants in that suit had made certain payments on foot of the rent decree; and it was contended by the distinguished and able vakil who appeared for the appellant in this case, that the petition was a pleading, and that the opposite party not having denied the averments of payment in satisfaction of the judgment debt, that

then it must be taken to be admitted, because the petition being a pleading requires admission or denial of every allegation of fact therein alleged; and if denial be not pleaded to traverse the facts stated that then the inference is to be drawn that the facts stated are admitted. We cannot accede to that argument. We do not think that a petition for leave to execute a decree is a pleading. A pleading has a distinct legal meaning and significance. A petition has not, and is a wholly different class of document. Therefore, we do not think that the mere fact that tenants did not deny the allegation in the petition, warrants us in arriving at the conclusion that the averments made in the petition as to payments made by the tenants on foot of the Collector's decree or order are admitted or deemed to be correct. The learned District Judge in this case seems to have thought that the argument which applied to case No. 261 as to payments on foot of the Collector's decree applied to all the six cases. His observations are very general and he has drawn no distinction between case No. 261 and the other five cases that I have already mentioned. He seems to suggest by his judgment that the mere assertion by the appellant that the applications were barred by limitation is in itself a denial of the allegation of acknowledgment of liability, that is to say, that if you plead the Statute of Limitation you must be thereby deemed to have traversed the allegations as to payments made on foot of the principal debt and thus the case is within the plea of the bar of the Statute of Limitation.

In my opinion that is entirely incorrect. The Statute of Limitation only deals with limitation as a bar to the original action. But if a payment be made by way of acknowledgment on foot of the general debt, then a new cause of action springs from that payment and limitation begins to run afresh. And, therefore, it is essential that the allegation of the appellant of the alleged payments made should have been specifically denied and traversed by the defendants-respondents here, if the petition filed was a pleading. The pleading of the Statute is not a denial per se of an alleged payment or acknowledgment made. The learned Judge then proceeds to deal with various matters affecting the jurisdiction

of the Sub-Divisional Officer or Collector of Barh, who made the order in the present case; and he by his judgment suggests various grounds upon which the order of that officer can be assailed. I personally cannot agree with the reasons put forward by the learned Judge save and except one, namely, that it must be shown that the officer who makes the order and exercises the jurisdiction and powers conferred upon him in pursuance of Ss. 69 and 70, Ben. Ten. Act is an officer clothed with authority. Once it is established to the satisfaction of the executing Court that such officer is clothed with authority, then he has jurisdiction to hear and if he has jurisdiction to hear, then the decision at which he arrives is final, binding and conclusive and it is so even though he may have erred in his findings of fact.

The learned Judge has remitted this case on two grounds: (1) To inquire, were the proceedings taken by the appellants barred by limitation? In my opinion the learned Judge is right in remitting one case on that ground, namely, case No. 261. In the other cases the question of the applications of limitation on the admitted facts is a matter of law and not of fact. We decide accordingly that the suits Nos. 248 and 262 to 265 inclusive are not barred by limitation of time, and that the appellant here is entitled to execute his decrees in those cases. I have already stated at length our reasons for so deciding, reasons which apparently were not present to the mind of the learned District Judge. As to suit No. 261 I think that the learned Judge was right in remanding that case for the purpose of ascertaining whether since the decree of the Collector of 3rd May 1911, payments had been made on foot of the same so as to take the case outside the operation of the Statute of Limitation; remembering always that in suit No. 261 the matter of the injunction proceeding does not arise. Accordingly we would maintain the order of the learned District Judge as to No. 261 and in doing so I wish to emphasise this, that we are not sending the case back on remand to ascertain anything conversant with the jurisdiction of the Collector, but only to decide a matter subsequent to his order of 3rd May 1911, whether payments were made on foot of this decree.

The learned District Judge secondly remands the case for the purpose of ascertaining whether Mr. J. G. Drummond had jurisdiction to compile the account filed by the appellant. I am rather at a loss to understand quite what the learned Judge means, but if he intends by his Judgment and by the frame of the question to enable the Court executing the decree to ascertain whether Mr. Drummond was the officer authorized by law to act in pursuance of Ss. 69 and 70, then I think he is right, but further or otherwise not, except as to matters involving the question of jurisdiction. Therefore, I think that the executing officer is entitled to be shown and to have proved before him that Mr. Drummond is the Sub-Divisional Officer charged with the administration of the duties conferred by Ss. 69 and 70. A reference to the Civil List will show that Mr. Drummond is the Sub-Divisional Officer for Barh Division, then by a reference to the Calcutta Gazette of 1886, part 1, p. 466, it will be found that Sub-Divisional Officers in pursuance of that order are entitled to represent the Collector and are charged with the administration of the duties of the Collector under Ss. 69 and 70. When the learned Munsif has been shown that, it will have been established that the person who made the order of 3rd May 1911 was an officer charged to do so by law. The learned District Judge suggests that these decrees will be valueless if it be shown that Mr. Drummond never in fact signed them. I quite admit that this is so, and if it be proved that the appellant had committed a forgery in procuring the decrees they will of course be no longer decrees but mere nullities. But it is upon the person who alleges that fact to prove it, because of course it is a question of fact going to the essence of jurisdiction.

Lastly, the learned Judge suggests that when a Court transmits its decree to an executing Court for its execution that it does so in a defined way, but that it would be a most dangerous innovation to allow a private person to bring the decree to the executing Court for execution. I think it is not a policy to be encouraged further than the limits of the law allow: because the proper way to receive the decree is by transmission from one Court to another in an authorized and defined method. But the matter of objection to which the learned Judge takes so much exception is

a method recognized and authorized by the Statute itself, for S. 70, Cl. 5, expressly gives the power to the landlord or the tenant to apply to the Collector for the order which he himself takes to the executing Court for execution. It is not an unnatural mode of doing it, and in the absence of any element of fraud it appears to me to be perfectly right. For these reasons we are of opinion that the cases Nos. 248 and 262 to 265 inclusive are disposed of by us. We allow the appeal in those cases and give the appellant the right to execute his decree in regard to those cases. Case No. 261 we remand, on the ground that the plaintiff or the appellant here must afford some proof of the alleged payments that were supposed to have been made by the respondents. In default of proof being given it would appear that in this case limitation of time has run, and in that event the appellant would not be entitled to execute the decree in case No. 261. Having regard to the argument on behalf of the tenants, and having regard to the success of the appellant, we think that the appellant, although he has partially failed in one of the six cases, is entitled to his costs in this Court, in the lower appellate Court and in the Subordinate Court. Costs will be measured at four gold mohurs to cover all the suits generally.

Mullick, J.—I concur.

V.S./R.K.

Order accordingly.

A. I. R. 1916 Patna 42

ROE AND JWALA PRASAD, JJ.

Bharat Das—Petitioner.

v.

Ram Charitar Das—Opposite Party.

Criminal Revn. No. 100 of 1916, decided on 16th May 1916, against an order of Deputy Magistrate, First Class, Muzaffarpur, D/- 4th April 1916.

Criminal P. C. (5 of 1898), Ss 145 and 146—Attachment of moveable propertye. g, cattle with immoveable property under Ss. 145 (4), 146 is perfectly legal.

In a proceeding under S. 145 a Magistrate ordered a math to be attached under S. (4) of the section and directed a police officer to take charge of it. The latter accordingly attached the math and also six cattle found therein. The Magistrate finally ordered the attachment of the math under S. 146:

Held: that the attachment of the cattle by the police officer was legal, inasmuch as they could not be released or made over to any of the parties until his right to the math was finally

determined by a competent Court. 30 Cal. 110; Dist; 14 I C 318, Ref. [P 43 C 2]

Baidayanath Narayan Singh — for Petitioner.

Jwala Prasad, J.—The only question in this case is, whether the police had legally taken charge of and attached six cattle found in the math at the time of attaching the math under orders of the Magistrate under S. 146, Criminal P. C. The facts briefly are that on 21st November 1915, Mohant Lachman Das, owner of a math or asthal in Bakhri, died leaving a large property including the math. The petitioner and one Ram Charitar Das claimed to be in possession of the property left by the mahant under different titles, the former as a senior chela and successor of the late mahant, and the latter by virtue of a tamliknama or deed of gift said to have been executed in his favour by the late mahant on 27th December 1914. On account of the dispute between the aforesaid rival claimants, leading up to an imminent danger of a breach of the peace, the Deputy Magistrate of Muzaffarpur instituted proceedings under S. 145, Criminal P. C., on 10th February 1916 in respect of village Bakhri with the math or asthal situate therein. Under Cl. (4), S. 145, Criminal P. C., the Magistrate attached the subject-matter in dispute, viz., the village Bakhri and the math, and directed the Sub-Inspector of Police to take charge of them. On 12th February 1916 the Sub-Inspector of Police accordingly attached the property, including six cattle that were found by him in the math at the time of attachment. The Magistrate finally by his order, dated 4th April 1915, directed the attachment of the village and the math under S. 146, Criminal P. C., until the rights of the parties were determined by a competent Court.

It is contended on behalf of the petitioner that the attachment of the cattle was illegal and without jurisdiction, inasmuch as Ch. 12, Criminal P. C., applies only to "disputes as to immovable property." No doubt, under S. 145 or 146, Criminal P. C., moveable property such as cattle cannot be attached. But in this case the Magistrate ordered the attachment of the math, which is immovable property. The Sub-Inspector attaching the math took charge of the cattle as they were found in the math. The Sub-Inspector, of course, was not

only entitled but was bound to take charge of everything that was within the math, including the cattle. After attachment no party had a right to enter into the math or to take possession of the property, moveable or immovable, appertaining to and found within the math. It is conceded that the persons entitled to the possession of the math will also be entitled to the possession of the cattle found within the math. The Magistrate was unable to decide which of the parties was in possession or was entitled to possession of the math in dispute and accordingly attached it under S. 146, Criminal P. C. The cattle could not be released or made over to any of the parties to the proceedings, until his right to the math in which the cattle were found was determined by a competent Court. The ruling reported as *Ramzan Ali v. Janardhan Singh* (1) cited by the learned vakil for the petitioner, where the crops of the land attached were severed from the land and stored in the threshing floor, does not apply to the facts of the present case. The principle of the authority in *Kochuny v. Manavikrama Rajah Amyal* (2), in which an elephant was taken possession of by the attaching officer, while attaching a forest in pursuance of a Magistrate's order to attach the forest under S. 145, Criminal P. C., supports the view that we have taken of this case. The Rule should be discharged.

Roe, J.—I agree.

V.S./R.K.

Rule discharged.

1. (1903) 30 Cal 110.

2. (1912) 14 I C 318.

A. I. R. 1916 Patna 43

CHAMIER, C. J. AND JWALA PRASAD, J,
Bakshi Bindeswari Prasad—Appellant.
v.

Dheninder Das—Respondent.

Misc. Civil Appeal No. 80 of 1916, Decided on 22nd December 1916, from order of Sub. Judge., Shahabad, D/- 18th March 1916.

(a) Execution—Decree against one defendant—Execution during pendency of appeal—Decree against both defendants in appeal—Second defendant cannot have credit for share of amount realised from first defendant.

In a suit against *H* and *B* a decree was passed against *H* and the suit was dismissed against *B*. The plaintiff appealed, and during the pendency of the appeal took out execution against *H* and realised a certain sum of money from the sale of

his property. In appeal a decree was passed against *H* and *B* jointly, but *H* alone was made liable for interest after the date of suit till realisation. The decree-holder then applied for execution against both *H* and *B*. The latter objected that he should be given credit for half of the sum realised by sale of *H*'s property:

Held: that the objection could not be sustained, inasmuch as the money was recovered at a time when there was no decree against *B* and it must be deemed to have been received by the decree-holder on account of the separate liability of *H*. [P 44 O 1]

(b) Civil P. C. (1908), O. 41, R. 22—Cross objections against defendant not party to appeal cannot be maintained.

In an appeal by one of two defendants, the respondent is not entitled to raise a cross-objection which is directed against the defendant who is not a party to the appeal. [P 44 C 2]

Rajendra Prasad—for Appellant.

Mrityunjay Lal—for Respondent.

Judgment.—In this case a decree was passed by a Subordinate Judge against one Harihar. The suit was dismissed against Bindeswari. The plaintiff in the suit appealed to the High Court and that Court passed a decree against Harihar and Bindeswari jointly for the principal sum due together with interest thereon up to the institution of the suit. The decree of the High Court made the defendant Harihar alone liable for interest after the date of suit till realization. While the appeal of the plaintiff was pending in the High Court, execution was taken out and Rs. 4,140 odd were recovered by sale of the property of Harihar. The decree-holder has now applied for execution against both Harihar and Bindeswar Prasad. The latter objected that he should be given credit for half of the sum realised by sale of Harihar's property. The Subordinate Judge rejected this objection and there can be no doubt that his decision is correct. The money was recovered at a time when there was no decree against Bindeswari at all and it is impossible to hold that it was received by the decree-holder on account of the debt due from Harihar and Bindeswari Prasad jointly, in face of the fact that Harihar both under the decision of the Subordinate Judge and under the decision of the High Court is liable separately for other sums. The decree-holder is plainly entitled to say that the sum of Rs. 4,140 odd was received by him on account of the separate liability of Harihar. The appeal therefore fails. The decree-holder filed a cross-objection, in which he challenges the decision of the Court with regard to the liability of Harihar but as Bindeswari is

the appellant a cross-objection which is directed against Harihar is not admissible. Harihar is not a party to this appeal. There is also in the cross-objection a plea that the Court below passed a wrong order with regard to costs. This objection, no doubt, is admissible, but it seems to us that the order of the Subordinate Judge is not open to objection. Neither party was wholly successful but the claims of both seem to have failed in part. Both appeals are dismissed. The appeal of Bindeswari Prasad is dismissed with costs. Hearing fee two gold mohurs. The cross-appeal is dismissed but there will be no order as to costs.

V.S./R.K.

Order accordingly.

A. I. R. 1916 Patna 44

MULLICK AND ATKINSON, JJ.

Mohammad Hasan and others—Defendants—Appellants.

v.

Nazar Mohammad and others—Plaintiffs—Respondents.

Second Appeal No. 2149 of 1915, Decided on 22nd July 1916, from a decision of Dist. Judge, Cuttack, D/- 6th April 1915.

Religious Endowments Act (20 of 1863), S. 7—Suit by some members of Committee is bad.

A Committee appointed under S. 7 is a Corporation having a legal entity, and is analogous in all respect to every other Corporation. If one member of the Committee is dead the surviving members can act till the new member is appointed, but a suit brought by some only of the existing members is bad for misjoinder of parties. 39 Cal 304 and 22 Mad 481, Ref.

[P 45 O 1,2]

Dwarka Nath Mitter and *Satish Chandra Bose*—for Appellants.

Suresh Chandra Chakravarty, *Subodh Chandra Chatterjee* and *Priya Nath Chatterjee*—for Respondents.

Atkinson, J.—Plaintiffs 1 and 2 bring this action to have it declared that they have a right in respect of all the property of Kadam Rasul and that they are entitled in the exercise of such right in this property to appoint a fit person to the office of daroga which fell vacant in the year 1911. The persons named as defendants 1 and 2 represent and are the sons of the last surviving trustee who died in 1911, a man called Syed Muhammad Athar, and defendant 3 is a member of the Committee appointed under the Religious Endowments Act of 1863 and he is one of three members of the Com-

mittee with plaintiffs 1 and 2 constituted under the statute. Defendant 3 declines to be joined as plaintiff in this action and the plaintiffs have thought fit to embark upon this suit without joining him as a plaintiff but joining him only as a defendant. The nature of the relief which the plaintiffs seek in this action is something in the nature of an ejectment; and, therefore, to entitle them to succeed they must prove in their proper capacity their title to the declaration which they seek.

The property in question undoubtedly forms the subject-matter of a religious endowment of great antiquity and at least it can be traced back for six generations and it can be shown that successively the office of daroga or trustee has been held from father to son by a long line of succession; and defendants 1 and 2 now claim, on the death of their father, to succeed as his heirs as trustees to the endowed property. There is very little dispute as to the question of fact in this case. But in 1864 under the power conferred by the Religions Endowments Act, 1863, the Ruling Power, having control over this endowment, appointed a Committee, in pursuance of S. 7 of that Act, composed of three members and it empowered them to discharge as regards the religious endowment all the rights and powers theretofore exercised by the Board of Revenue. Plaintiffs 1 and 2 and defendant 3 constitute the committee and were appointed in the year 1899. Now this Committee is a Corporation; the members do not claim any individual right. What they assert is a joint right exercisable by them all in a corporate capacity. That they are a corporation seems beyond doubt; and as long as they jointly constitute a corporate body each and every member of the corporation must be joined as plaintiffs to entitle them to succeed. The case of *Raghunandan Ramanuja Das v. Bibhuti Bhushan Mukherjee* (1) clearly shows that under this very statute the High Court of Calcutta held that a committee appointed under S. 7, Religious Endowments Act is a corporation having a legal entity and is analogous in all respects to every other corporation. To the like effect is *Anantanarayana Ayyar v. Kuttalam Pillai* (2). If one member of the corporation is dead then the survivors

can act until the new member may be appointed. That is not this case. In this case we have three members two of whom are willing to act in enforcing this claim and one is not, and we are clearly of opinion that this action must fail by reason of defective joinder of parties as the corporation is not before the Court in its legal entity. The plaintiffs do not appear before the Court in their representative capacity.

I desire to add an observation on the general aspect of the case. The learned Judge has held on the evidence that the custom with regard to this religious endowment is that the office of daroga is hereditary. He agrees with the Subordinate Judge in that view, and there appears to be ample evidence to sustain that finding. But the learned Judge further adds that he is bound to hold that the hereditary office is transmissible to the eldest son of each deceased daroga. For that we can find no authority on the evidence whatsoever; and it appears to us that unless there was legal evidence to establish a custom that the office was transmissible to the eldest male descendant of the last surviving daroga, the ordinary law would apply and the office would be transmissible to the succeeding heirs of the last surviving daroga. We say this because we hope it may be of some assistance if this action should be tried again for determining what are the legal rights of the parties. However, we dismiss this action for defective joinder of parties. I would allow the appeal and dismiss the suit with costs in all Courts.

Mullick, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 45

ROE AND JWALA PRASAD, JJ.

Nanoo Thakur—Petitioner.

v.

Kuldip Thakur and others—Opposite Parties.

Civil Revn. No. 164 of 1916, Decided on 22nd November 1916, against order of Sub-Judge, 1st Court, Mozuffarpur, D/- 29th August 1916.

Civil P. C. (1908), S. 151—Court has power only to amend decree so as to bring it into conformity with pleadings.

In a partition suit a preliminary decree was made and a Commissioner was appointed to make an allotment. While the case was before the commissioner one K, whose name was not

1 (1912) 39 Cal 304=12 I C 147.

2. (1899) 22 Mad 481.

in the decree, applied for amendment of the decree so as to include his name in it and also asked for the allotment of a separate share to him. The Court made the amendment and ordered the case to proceed de novo:

Held: that the Court had no power under S. 151, to make such order. Under that section it had power only to amend the decree so as to bring it into conformity with the pleadings and should have acted accordingly. [P 46 C 1]

Baidyanath Narain Singh—for Petitioner.

Ganesh Dutta Singh and Siv Nandan Rai—for Opposite Parties.

Judgment.—In this case the lower Court had made a preliminary decree for partition without contest among the parties. An order was issued to a commissioner to make an allotment and while the case was before the commissioner, one Kirtan Thakur discovered that his name was not in the decree although he was a cosharer in the property. He, therefore, went to the learned Subordinate Judge and asked that the decree be amended so as to include his name as a co-sharer. He also asked for an allotment of a separate share. The learned Subordinate Judge thereupon, under what he described as his inherent power under S. 151, set aside the preliminary decree and directed that the whole case be tried de novo. This the learned Sub-Judge had no power whatever to do. Under S. 151 he had power to amend the decree so as to bring it into conformity with the pleadings and this is the course which he should have adopted.

We, therefore, set aside the order made and direct that the learned Subordinate Judge do now take up the petition of Kirtan Thakur and proceed to bring the preliminary decree into conformity with the pleadings. He will then take up the commissioner's final report and consider that report in the light of the amendment made in the decree, and if without prejudice to the interests of the other parties concerned in the case Kirtan Thakur can at this stage be given a separate allotment, there will be no objection to that course being taken. We make no order as to costs. Let the record be sent down at once.

V.S./R.K.

Order set aside.

A. I. R. 1916 Patna 46

JWALA PRASAD, J.

Mahabir Lal—Defendant—Appellant.
v,

Shah Malikuddin and others—Plaintiffs—Respondents.

Second Appeal No. 532 of 1916, Decided on 8th December 1916, from decree of Special Judge, Shahabad, D/- 27th January 1916.

Bengal Tenancy Act (1885), Ss. 109-A and 105 and 30-B—Second appeal.

No second appeal lies against the decision of a Special Judge settling a fair and equitable rent under S. 105. 1 P. L. J. 409, *Foll.* [P 46 C 2]

Uma Charan Laha and Gour Chandra Paul—for Appellant.

Fakhruddin and Mohammad Tahir—for Respondents.

Judgment.—The appellant Mahabir Lal was recorded as a tenure-holder in the finally published Record of Rights. The respondent, who is the landlord, applied under S. 105, Ben. Ten. Act for the enhancement of the rent of the tenure under S. 7, of the Act, and in the alternative for enhancement under S. 30-B of the Act in case the appellant was held to be an occupancy raiyat. The appellant contended that he was an occupancy raiyat and his rent was not liable to enhancement and that the lands were of inferior quality and yielded very poor outturn. The Assistant Settlement Officer held that he was a tenure-holder and enhanced the rent by Rs. 40-15-6. His rent entered in the Record of Rights is Rs. 147-0-6. The Assistant Settlement Officer fixed Rs. 188 as fair and equitable rent for the tenure under S. 7, Cl. (2), of the Act. Mahabir Lal appealed to the special Judge of Shahabad, who held, differing from the view of the Assistant Settlement Officer, that the tenant was an occupancy raiyat but he confirmed the fair and equitable rent of Rs. 188 settled by the Assistant Settlement Officer.

This order of the Special Judge is, therefore, a decision settling a rent under S. 105, Ben. Ten. Act. No second appeal lies from the decision settling the rent under S. 109-A Cl. (3) of the Act. This appears to be the settled law, vide, *Sajivan Mahto v. Gulab Chand Lal* (1). A reference may also be made to *Naimuddin Shaikh v. Ram Rangini Dasi* (2). The contrary view is not seriously contended by the appellant in this case. The

1. (1916) 1 P L J 409=35 I C 678.

2. (1909) 13 C W N 220.

second appeal to this Court is, therefore, incompetent. It is contended, however, that the Special Judge acted illegally and with material irregularity in not confirming to S.30-B in settling the rent of the holding. The application of the respondent before the Assistant Settlement Officer was for settlement of fair and equitable rent under S. 7, Cl. (2), of the Act and in the alternative under S. 30-B. The Special Judge in appeal held that the tenant was not a tenure-holder and hence S. 7, Cl. (2) does not apply. He held that the tenant was an occupancy raiyat and, therefore, the enhancement could only be made under S. 30-B of the Act as was the alternative prayer of the landlord. Under S. 30-B the enhancement would be on the ground that there has been a rise in the average local prices of staple food crop during the currency of the present rent.

The Special Judge has not conformed to the rule embodied in 30-B as he should have done under S. 105, Cl. (4), but has settled the rent on the ground that the produce of the land would give to the tenant much more than Rs. 25 a bigha and the rent fixed by the Assistant Settlement Officer comes to less than Rs. 3-12-0 a bigha. This is not the mode prescribed by S. 30-B for the settlement of rent of an occupancy raiyat as fair and equitable. There is no doubt that the Special Judge acted illegally in settling the rent of the appellant, but howsoever wrong his decision be as to the principle on which fair and equitable rents should be arrived at, it is nonetheless a settlement of fair and equitable rent and his decision cannot be questioned in second appeal. The appellant's Vakil asks me to treat this appeal as an application for revision under S. 115, Civil P. C., and to set aside the decision of the Special Judge. I am not prepared to concede to the prayer of the appellant and I hold that the appeal is incompetent and should be dismissed. The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 47

CHAMIER, C. J. AND ROE, J.

Buldeo Narain Singh—Appellant.

v.

United India Bank, Ltd. — Respondents.

Misc. Appeal No. 396 of 1915 and Rule No. 1169 of 1915, Decided on 7th December 1916.

Companies Act (1913), Ss. 171 and 232 — Execution sale without permission of Court after winding up order is voidable.

Where a company has gone into liquidation, a sale of the assets of the company after the winding up order in execution of a decree passed before the date of that order without the permission of the Court in accordance with the provisions of S. 171, is voidable at the instance of the liquidator. Want of knowledge of the winding up order does not validate such a sale.

[P 48 C 1]

*Sushil Madhab Mullick—*for Appellant.

*Parmeshwar Dayal—*for Respondents.

Roe, J.—The judgment-debtor is the United India Bank, Ltd., with head quarters at Mainpuri, United Provinces. On 12th December 1914 an official liquidator was appointed to wind up the judgment-debtor Company. When the winding up order was made, whether it was made by the Court or only under the supervision of the Court, we are unable to ascertain either from the record or from instructions given to the vakils on either side. The judgment-debt arises from a decree for money made by the Court of the Subordinate Judge of Muzaffarpur. That decree is dated 7th May 1914. On 11th February 1914 an application for attachment before judgment was made and attachment reported on 5th March 1914 to have been made. In execution of the decree upon the judgment a copy of this attachment order was filed on 12th August 1914 and proclamation was issued for the sale of the property on 14th September 1914. Decree-holders in two other execution cases (Nos. 276 and 334 of 1914) applied for rateable distribution of the proceeds of the sale. On 15th September 1914 and again on 16th November 1914 abortive attempts were made to complete the sale. On neither occasion were prices bid which the Court could accept. On 16th January 1915 a bid was made (upon the third proclamation and sale) and accepted by the Court. On 15th February 1915 the official liquidator applied to have the sale set aside on the ground that "the sale is irregular, illegal and void in law." On the same date a further petition was put in by the liquidator objecting to the sale on the ground that no notice had been served on him. The Court of the Subordinate Judge held these objections frivolous and confirmed the sale. On appeal to the District Court the learned Judge upset the sale on the ground that

"no permission was taken from the District Judge of Mainpuri under S. 171, Companies Act."

A rider was added to the Judge's judgment. "The respondent will have to take out his execution in accordance with S. 171, Act 8 of 1913." The decree-holder, therefore, appeals to this Court, and also, in case no appeal lies, moves this Court under S. 115. I am of opinion, that the questions involved, arise in connexion with the execution and satisfaction of a decree and that the proceedings must be taken as proceedings under S. 47. An appeal, therefore, lies. It had never been suggested before the Subordinate Judge that any permission for the proceedings was required from the District Judge of Mainpuri. Had such an objection been taken the decree-holders might have asked for time to obtain the permission of that Court and the Subordinate Judge would (or at least should) have granted the application. The considerations upon which the Court winding up a company should grant permission to proceed with execution duly levied before the winding up is commenced are set forth in S. 913 (p. 535), Vol. 5, Halsbury's law of England. It may be that the case before us is one in which the creditors who were to have benefited by this sale are deserving of sympathy, but discretion in the matter vests not in the Court executing the decree, but in the Court winding up the company. The learned Judge pointed out on 4th June 1915, to the decree-holder that his remedy lay in an application to the Mainpuri Court for permission to proceed with the execution. Nothing has yet been done in that direction and the learned vakil for the appellant has made no suggestion to this Court that we should give him time to get the sanction of the Mainpuri Court to the sale already held. His only argument has been that as he did not know of the winding up before the sale was held the sale is not affected by S. 171. This is an entire fallacy. Knowledge of the order cannot affect the applicability of the section. A sale held in contravention of that section is without doubt voidable at the instance of the liquidator. The order of the District Court was correct. The appeal is dismissed with costs.

Chamier, C. J.—I agree that the appeal should be dismissed with costs.

S. 171, Companies Act 1913, provides that when a winding up order has been made no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. The winding up order was made in the present case on 12th December 1914. The Muzaffarpur Court should not have sold the property on the 16th January. On that date it may not have been aware of the winding up order. It became aware of the order before the sale was confirmed and it should have refused to confirm the sale until the leave of the Mainpuri Court had been obtained. If the decree-holder wishes to bring the property to sale, he must obtain the leave of the Mainpuri Court.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 48

ROE AND JWALA PRASAD, JJ.

Gajadhar Prasad—Defendant—Appellant.

v.

Thakur Prasad Singh—Plaintiff—Respondent.

First Appeal No. 426 of 1913, Decided on 27th June 1916, from decision of Sub. Judge, Bhagalpur, D/- 20th August 1912.

(a) **Limitation Act (1908), Art. 110—Suit for arrears of rent by assignee of landlord is governed by Art. 110 and not by Bengal Tenancy Act (1885), Sch. 3, Part 1, Cl. 2.**

An assignee of arrears of rent from a landlord is not a landlord within the meaning of the Bengal Tenancy Act. Therefore, a suit by an assignee for arrears of rent is governed not by Cl. (2), Part 1, Sch. 3, Ben. Ten. Act, but by Art. 110, Sch. 1, Limitation Act, whereby the period of limitation is restricted to three years from the date on which rent fell due: 15 Cal 221, Dist.; 26 All 138; 17 Cal 469 and 27 Cal 827, Ref.

[P 49 C 1]

(b) **Limitation Act (1908), Art. 116—Assignee suing for arrears of rent on registered lease—Limitation period of, is not extended.**

The fact that the assignee of a landlord is suing for arrears of rent on a registered lease does not extend the period of limitation to six years, vide Art. 116, Limitation Act.

[P 49 C 2]

Dhirendra Nath Dutta—for Appellant.

Baldeo Narain Singh and Lal Mohan Ganguli—for Respondent.

Judgment.—In this case the respondent has obtained a decree for one year's rent upon a patni lease in writing and registered. The appellants appeal on the ground that the suit was barred by limitation. The respondent was not a landlord, but an assignee, holding no title as

landlord, of arrears of rent due to the landlord. The terms of the lease are, that the rent shall be payable in four instalments, due on the 15th Asin, 15th Pous, 15th Chait and 15th Asar. The suit was for recovery of the four kists of the year 1314, and the last of these four kists was payable on the 15th Asar 1314, which was 10th July 1907. The present suit was brought on 29th August 1910. It is urged therefore by the appellants that the strict three years' rule should apply. On behalf of the respondents it is argued that if the land is used for agricultural purposes then the Bengal Tenancy Act would apply, and limitation runs under Sch. 3, Cl. (2), from the last date of the year in which the rent fell due. It is further argued that the patni lease being a registered agreement Art. 116, Limitation Act, would apply, inasmuch as the failure to pay rent was a breach of a contract in writing and registered. The latter contention is based on *Umesh Chunder Mundul v. Adarmoni Dasi* (1), where the money sued for was due upon an agreement in respect of certain lands upon which salt was to be manufactured. It may be fairly said that such money was not rent but royalty.

This case was dissented from in *Ram Narain v. Kamta Singh* (2) and distinguished in *Iswari Pershad Narain Sahi v. Chowdry* (3). In the case before us the sum due was rent. That point has been fully dealt with in the Full Bench decision in *Srish Chunder Bose v. Nachim Kazi* (4). Limitation must therefore be governed either by Art. 110 or by Ben. Ten. Act, Sch. 3, Part 1, Cl. (2), which refers to three classes of plaintiffs only: (1) a sole landlord, (2) an entire body of landlords and (3) one or more cosharer landlords. The assignee of a landlord is not a landlord at all, and therefore has not the advantage of an extension of limitation of three years from the date when each kist falls due to three years from the last day of the agricultural year. A suit by an assignee who is not a landlord is not recognized anywhere in the Bengal Tenancy Act. Such a suit must be governed by Art. 110, Limitation Act, whereby limitation is restricted to three years from the date on which it fell due.

1. (1888) 15 Cal 221.
2. (1904) 26 All 138.
3. (1890) 17 Cal 469.
4. (1900) 27 Cal 827.

1916 P/7 & 8

Art. 116 does not alter this period of limitation merely because a patni lease has been registered. It would be an extraordinary business if the landlord himself could not sue for rent for more than four years, but could, by assigning arrears already barred by limitation to a third party, make the tenants liable to that third party under Art. 116 for the arrears of six years.

We are satisfied that limitation in this case runs from the date upon which each instalment fell due under the terms of the patni lease and that therefore the sum claimed was barred by limitation. The appeal is decreed. Inasmuch as the defendant in addition to his plea of limitation has set up various grounds of non-liability which in the analogous case we have found good reason to believe were not taken in good faith, we direct that in the lower Court both sides bear their own costs and that in this Court the respondent pay costs of the appeal. This decision upon the questions of limitation and costs disposes also of Appeal No. 425 of 1913.

V.S./R.K.

Appeal decreed.

A. I. R. 1916 Patna 49

SHARFUDDIN AND ROE, JJ.

Nilmani Goswami—Appellant.

v.

Roban Maijhi—Respondent.

Appeal No. 4 of 1916, Decided on 19th June 1916, from appellate order of Dist. Judge., Purulia, D/- 29th July 1915.

Chota Nagpur Tenancy Act (1908), S. 231—Holding sold in execution of mortgage decree—Application to set aside sale must be made within one year of date of sale.

Respondent obtained a decree on a mortgage-bond executed by the appellant, and in execution of that decree the latter's holding was sold and purchased by the former. Appellant applied to set aside the sale more than one year after its date:

Held: that under the provisions of S. 231 the application should have been made within one year of the date of the sale, and that, consequently, it was barred by limitation. *A I R 1914 Mad. 297, Dist.* [P 50 C 1]

Abani Bhusan Mukerjee—for Appellant.

Sharfuddin, J.—This miscellaneous appeal has been preferred by the decree-holder. It appears that the decree-holder obtained a decree on a mortgage-bond executed by the present petitioner and in execution of that decree the holding in question was sold and purchased by the mortgagee decree-holder. The sale took place on 21st December 1912 and was

confirmed on 15th February 1913. The application to set aside the sale was made by the judgment-debtor on 28th August 1914. The learned Munsif held that Art. 166, Lim. Act, applied to the application and hence it was barred by limitation because the judgment-debtor had put in the application to set aside the sale more than thirty days after the date of the sale. On this there was an appeal to the District Judge by the judgment-debtor, who allowed the appeal and directed the sale to be set aside. But that learned officer also held that it was Art. 166 that applied to the application. Thereupon the decree-holder preferred the present appeal. It seems to us that the application of the judgment debtor to set aside the sale is barred by limitation. In the Chota Nagpur Tenancy Act there is a special provision for limitation as regards suits and applications, and S. 231 of that Act clearly provides that if there is no provision of limitation in that Act for any suit or application, the limitation provided is one year and under the provisions of this special provision of the Chota Nagpur Tenancy Act the judgment-debtor should have applied to have the sale set aside within one year from the date of the sale. His application is after a year and some months from the date of the sale. On behalf of the judgment-debtor it was contended that the holding which was sold in execution of the mortgage-decree was a raiyati holding and under S. 47, Chota Nagpur Tenancy Act, such a holding could not be sold in execution of a decree, and hence it is contended that the sale was null and void.

In this connexion we have been referred to the case reported as *Samandan Karkal Edathil Rayarappan Nambiar v. Malikandi Aketh Mayan* (1), wherein we find in the head-notes mentioned that when the sale is a nullity Art. 166 has no application. The head-notes of that ruling are misleading. We do not find in that report any such proposition of law. Even if Art. 166 has no application in the case of a sale which is a nullity, the special provision of the Chota Nagpur Tenancy Act has laid down that S. 231 may be applicable. As already observed even under that section the judgment-debtor's application to set aside the sale is barred by limitation, and we do not propose to discuss the question as to whether by reason of S. 47, Chota Nagpur Tenancy Act, the

sale was null and void. The appeal is therefore, decreed.

Roe, J.—I agree. The application to set aside the sale was clearly barred by limitation, and the District Court had no jurisdiction to set aside the sale of its own motion.

V.S./R.K.

Appeal allowed.

A. I. R. 1918 Patna 50

MULLICK AND ATKINSON, JJ.

Jhari Singh and others—Defendants—Appellants.

v.

Pirthi Nath Sahu and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2781 of 1915, Decided on 7th December 1916, from decision of J. C., Chota Nagpur, D/- 25th September 1915.

Civil P. C. (1908), O. 14, R. 5—Court cannot convert one cause of action into different cause of action.

The power of a Court to amend the pleadings is precise and is clearly laid down in O. 14, R. 5, and a Court has no power to convert one cause of action into a different cause of action. Its power to alter the fame of the suit is co-existent with the power that it has to amend.

A claim for ejectment on basis of unlawful possession cannot be amended so as to convert it into a claim on the basis of a contract of tenancy: *Newby v. Sharpe*, (1878) 8 Ch. D. 39; 13 Bom. 664 and 5 All. 456, Ref. [P21 05]

Susil Madhaub Mullick—for Appellants.

Mahomed Fakhruddin—for Respondents.

Atkinson, J.—The real plaintiff in this action is a minor, and he sues through the Manager of Encumbered Estates, defendants 1, 2 and 3, who are the contesting defendants in this action, for a declaration of his title to 27 bighas 10 kothas of Mouza Mokhar Kalan, and that, consequential upon that declaration of title, the plaintiff may be put into possession of the same, and defendants 1, 2 and 3, who are alleged to be in possession, may be put out of possession, and that it may be declared that their possession was and is unlawful, and that further relief may be granted by way of mesne profits in the nature of damages for use and occupation as against defendants 1, 2 and 3 as trespassers. The plaint is very short but very concise. The plaintiffs set up a title that they are jagirdars of this 27 bighas of land, that it forms part of their ancestral estates and that they have been in possession of it

from generation to generation; that on 19th November 1908, they let out these lands for a period of three years to the pro forma defendants 7 and 8, and that defendants 1, 2 and 3 dispossessed the pro forma defendants 7 and 8 from the lands, cut the crops thereon and asserted their title and right to the lands in suit; that they acted in this respect as trespassers without one shred of title—and the plaintiffs' whole claim is only consistent with a claim for ejectment of defendants 1, 2 and 3. The case came before the Subordinate Judge and the issues were fixed. The first issue was: "Has the plaintiff any cause of action? 2. Is the suit barred by limitation? 3. Has the plaintiff any right to the lands in suit as against defendants 1, 2 and 3? 4. To what mesne profits, if any, is the plaintiff entitled?"

At the trial the defendants by their defence set up a counter-title to that of the plaintiffs of exactly the same character; and this seems to have been their real and only defence. They did not suggest in the written statement, directly or indirectly, that they claimed the lands, or were in possession of the lands as tenants to the plaintiffs. Nor does the plaintiff in his plaint suggest that the defendants' occupation of the lands is based upon any tenancy existing between him and the defendants. The case came on for trial before the Subordinate Judge, and he adopted what seems to us a very extraordinary course. Evidence was adduced during the course of the hearing of the case from some books which were produced by the plaintiffs, which clearly proved that defendants 1 to 3 were in khas possession of the lands in dispute as tenants of the plaintiffs. The learned Judge is satisfied beyond all shadow of doubt that the plaintiffs have established their title as maliks to 'this 27 bighas 10 kathas of land; and although the suit is framed in the form in which I have indicated, namely as an equitable ejectment, a declaration of title coupled with the claim to khas possession consequential thereon, the learned Subordinate Judge pronounces a decree on the basis that defendants 1 to 3 are tenants to the plaintiffs.

Having decreed that the plaintiffs have established their jagir title, he declines to give them khas possession, and then awards mesne profits on the basis of rent.

Thus the learned Subordinate Judge has granted a form of relief totally inconsistent with the whole nature of the plaintiffs' claim, and a relief not suggested or indicated in any way whatsoever in the defendants' written statement. The action is framed in ejectment, the relief is granted as upon the basis of a contract of tenancy existing between a landlord and tenant. That case is foreign, absolutely foreign, to the case made by the plaintiffs and the counter-case made by the defendants. However, the subject-matter of the learned Subordinate Judge's decision came before the Judicial Commissioner at Ranchi on appeal by defendants 1 to 3, and the Judicial Commissioner held that the cause of action set out in the plaintiff's plaint was non-existent, that is to say, that the case so far as it was based on eviction and the right to claim khas possession had not and could not be established; but that there was a cause of action in reference to the plaintiff's title. Accordingly he concurred in the views expressed by the Subordinate Judge, granted a declaration of the plaintiff's title, and supported the decree so far as it awarded mesne profits on the basis of rent to the plaintiff on foot of a tenancy existing between him and defendants 1 to 3. It is very hard to understand upon what principle either of the two lower Courts acted. No application to amend the plaint was put forward by the plaintiffs, nor did the defendants themselves ask for any alternative relief, which would have warranted the Court in raising or framing any additional issues which might have determined the question which the Court decided.

However, the power of the Court to amend the pleadings is precise and clearly laid down in O. 14, R. 5. But the Court cannot convert one cause of action into a different cause of action. Its power to alter the frame of the suit is co-existent with the power that it has to amend. This matter has been discussed and considered very fully, not only in this country but in England, and the law is clearly laid down in O. 14, R. 5. The wording of this order differs in no respect from the wording of the old S. 149, Civil P. C. of 1882. In *Newby v. Sharpe* (1)—the case itself is the converse of the present case, but the principle is applicable

1. (1878) 8 Ch D 39=47 L J Ch 617.

—the great and distinguished Judge Lord James says at p. 49 :

"At the hearing an amendment was allowed which appears to me to be of an unprecedented description, as it entirely alters the nature of the case made. The claim was based on the continuance of the relation of lessor and lessee between the parties, the amendment is based on an eviction of the plaintiff by the defendant, entitling the plaintiff to damages."

That their Lordships describe as being unprecedented. Here the Court of its own motion, without any application to amend, gives a decree inconsistent with the entire cause of action as framed in the plaint. But the matter is very clearly also discussed and laid down in *Narayan Ganesh v. Hari Ganesh* (2). There the learned Judge says:

"The first question to be determined is, whether the Subordinate Judge exercised a proper discretion in allowing the additional issues to be framed."

And their Lordships refer there to *Newby v. Sharpe* (1) and discuss the various other authorities, and decide that there was no power to make the amendment in that case that was made, which altered the whole character and nature of the suit. There will also be found the case of *Hamilton v. Land Mortgage Bank of India* (3), in which the same principle is adopted and acted upon, and at p. 459 Straight J., says:

"It seems to us sufficient to say that this was not the footing upon which the Bank came into Court, nor, looking to all the circumstances, do we think it should be permitted to make such a complete change of front, and to obtain relief upon grounds, not only that it did not set up but by the very plaint itself controverted. Some regard must be paid to the form of pleadings, and though the circumstances out here are such that it would be unwise to test them by very strict or technical rules, we cannot countenance the notion that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegations."

We think the principles laid down by these cases apply to the present case, and that it was not within the jurisdiction or power of the learned Judicial Commissioner or the Subordinate Judge to transform the suit in the manner in which they have done, by giving a decree as against these defendants on the basis that they were tenants of the plaintiffs and liable to pay rent to the plaintiffs, having regard to the nature of the plaintiffs' cause of action. Therefore, we

think the plaintiff is entitled to retain the declaration that he has obtained as to his title to these lands. Nevertheless we think that the claim for khas possession must absolutely fail, and in that view the plaintiff is not entitled to retain the judgment which he has got for rent as against these defendants. Accordingly we allow this appeal, subject to the declaration as to the plaintiff's title, which we shall declare; we will reverse the order of the learned Subordinate Judge and the learned Judicial Commissioner, and allow the appellants in this case their costs of this appeal.

Mullick, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1917 Patna 52

ROE AND JWALA PRASAD, JJ.

Bala Lal Mahton—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 101 of 1916, Decided on 16th May 1916, against order of Dist. Magistrate, Gaya, D/- 3rd April 1914.

Criminal P. C. (5 of 1898), S. 107—S. 107 is applicable to person trying to enforce claim through armed servant while himself keeping in back-ground.

Section 107 is applicable to a man who asserts a claim, and keeping himself in the background makes preparations for the enforcement of that claim through a servant who is continuously armed: 8 I C 818 and 17 W R 54 Cr, Dist.

[P 53 C 1]

S. Sinha and K. P. Jayaswal—for Petitioner.

Sultan Ahmad—for the Crown.

Judgment.—The facts of this case briefly are, that two holy men of Gaya are contesting the right to take offerings from pilgrims on their alighting from the train at the Gaya railway station. The finding of fact is that one of these Bala Lal Mahtha, employs two servants, one called Kamla Prasad and the other Ram Kishen Singh. The procedure adopted is that Kamla Prasad approaches the pilgrims with peaceful methods while Ram Kishen Singh stands behind armed with a lathi. This as shown by the police evidence, has given rise to one disturbance resulting in criminal trial, and several minor disturbances which have not been thought worth while taking to the Courts.

It is obvious that the attitude adopted by the rival claimants is one calculated to provoke at any time a serious disturbance of the public tranquility. The

2. (1889) 13 Bom 664.

3. (1883) 5 All 456.

ground upon which Mr. Sinha pleads that Bala Lal and Kamla Prasad are not persons to whom S. 107 applies, is that Kamla Prasad has obviously not been guilty of any overt act likely to occasion a breach of the peace, while Bala Lal Mahatha, in that he remains always in his own house and does not go to the railway station, cannot be responsible for the overzeal of Ram Kishen Singh. In this connexion the cases of *Jagat Narain v. Emperor* (1) and *Ram Coomar Banerjee v. Rajah Gopal Singh Deb* (2) are quoted. Neither of these cases has any application. The case of *Jagat Narain v. Emperor* (1) was in respect of a member of a large community who clearly could not be expected to exercise control over the whole community. We have here the case of a master putting forward a claim which was itself likely to be fought over by armed forces on both sides. In spite of the fact that his servant Ram Kishen has on a previous occasion brought about a breach of the peace he has continued to employ him and continued to send him to the railway station armed with a lathi.

We are satisfied that S. 107 is applicable to a man in his position. He is in fact asserting a claim and making preparations for the enforcement of that claim through a servant who is continuously armed. The question of Kamla Prasad is different and we are relieved from the necessity of discussing it by Mr. Sultan Ahmad's acceptance of the proposition that so long as Bala Lal Mahatha remains bound down, his servant Kamla Prasad is not likely to occasion any breach of the peace. Let Kamla Prasad be discharged from his security. We see no reason to interfere with the order demanding security from Bala Lal Mahatha.

V.S./R.K. Order accordingly.

1. (1910) 8 I C 818.
2. (1872) 17 W R 54 Cr.

* A. I. R. 1916 Patna 53

ROE, J.

Sukhdeo Singh—Petitioner.

v.

District Magistrate of Muzaffarpore
—Opposite Party.

Criminal Revn. No. 13 of 1916, Decided on 30th August 1916, against order of Sessions Judge, Muzaffarpore. D/- 31st July 1916.

* (a) Criminal P. C. (1898), S. 195—Case of Small Cause nature—Sanction refused by Small Cause Court—District Judge cannot grant sanction.

A District Judge has no power to grant sanction to prosecute under S. 209, Penal Code in respect of a case instituted in a Small Cause Court and with regard to which sanction has already been refused by the Small Cause Court Judge; 1 P L J 206, Foll; 34 All 197, Rel. on; 37 Cal 13, not Foll; 31 All 313, Ref. [P 53 C 2; P 54 C 1]

(b) Criminal P. C. (1898), S. 195 (7) (c)—“That is to say”—Meaning explained.

The words “that is to say”, in sub-Cl. (c) of Cl. (7), S. 195, indicate not that a supplementary provision is to be found in Cl. (c), but merely an explanation of the words “to which appeal ordinarily lie.” [P 54 C 1]

(c) Criminal P. C. (1898), S. 195 (7) (c),—“Original jurisdiction”—Meaning explained.

The words “original jurisdiction” in Cl. (7) (c), S. 195 mean “original jurisdiction over the class to which the case in question belongs.” [P 54 C 1]

* (d) Criminal P. C. (1898), S. 195 (7) (c)—Case cognisable by Small Cause Court—District Court is not principal Court of original jurisdiction—Civil P. C. (1908), S. 9—Provincial Small Cause Courts Act (1887), S. 16.

By S. 9, Civil P. C., and S. 16, Provincial Small Cause Courts Act, the jurisdiction of the District Court has been expressly barred in all cases of a nature cognizable by a Small Cause Court. Therefore as regards such cases the District Court is not the principal Court of original jurisdiction. [P 54 C 2]

* (e) Criminal P. C. (1898), S. 195 (7) (c)—Scope.

Small Cause Court is itself a principal Court of original jurisdiction with regard to suits cognizable only by such Court. [P 54 C 2]

Ali Imam—for Petitioner.

Sultan Ahmad—for the Crown.

Judgment.—The point for decision in this case is, has the District Judge power to grant sanction to prosecute under S. 209, I. P. C., in respect of a case instituted in the Small Cause Court and with regard to which sanction has already been refused by the Small Cause Court Judge? The question has been answered in the negative in *Ambica Tewari v. Emperor* (1) and *Ajodhia Parshad v. Ram Lal* (2). But in *Ram Prosad Malla v. Raghubar Malla* (3) it is quite clear that their Lordships of the Calcutta Court saw no reason to consider that the Court of the District Judge was not the principal Court of original jurisdiction in such a case within the meaning of Cl. 7 (c), S. 195, Criminal P. C. I have been asked by the learned Deputy Government

1. (1916) 1 P L J 206=34 I C 320.
2. (1912) 34 All 197=13 I C 284.
3. (1910) 37 Cal 13=4 I C 6.

Advocate, in view of this difference of opinion, to refer this matter to a Full Bench. I am not prepared to do so for it seems to me clear that the view taken in Allahabad and already followed in this Court is the correct view. Moreover it is to be noted that in *Ram Prosad's* case (3), there is no definite finding that a District Judge has jurisdiction to interfere with the discretion of a Small Cause Court in these matters. The question was not raised and cannot therefore be said to have been decided. S. 195 (7) (c), Criminal P. C., runs:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say, where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate."

I would attach importance to the words "that is to say." They indicate not that a supplementary provision is to be found in Cl. (c), but merely an explanation of the words "to which appeals ordinarily lie." It is contended by the learned Deputy Government Advocate that the reasoning, upon which the case of *Wazir Mahammad v. Hub Lal* (4) and *Ajodhia Parshad v. Ram Lal* (2), were decided, is an erroneous reasoning, for the words of S. 195, Cl. (7) (a) and (b), clearly refer to classes of Courts and not merely to classes of cases. Even granting this for the sake of argument, it still seems to me that we have to consider the actual meaning of the words "the principal Court of original jurisdiction." It would be idle to say that a District Court has jurisdiction to grant sanction in cases coming before the Collector in his capacity as a Revenue Court. The words "original jurisdiction" must clearly mean original jurisdiction over the class to which the case in question belongs. A District Judge could not possibly be asked to interfere with orders granting sanction for perjury, for instance in cases tried under the Land Registration Act or the Partition Act. In considering to what class a case belongs we have to consider not only the three main classifications, civil, revenue or criminal, but also to consider the sub-divisions of those civil, revenue and criminal classes. S. 9, Civil P. C., runs:

"The Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which

4. (1909) 31 All 313=2 I C 182.

their cognizance is either expressly or impliedly barred,"

and S. 16, Provincial Small Cause Courts Act, runs:

"Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

By these sections the jurisdiction of the District Court has been expressly barred in all cases of a nature cognizable by a Small Cause Court. It cannot be said that in cases of a nature cognizable by a Small Cause Court the District Court is the principal Court of original jurisdiction. Nor in my view is there anything anomalous in saying that a Small Cause Court is itself a principal Court of original jurisdiction with regard to suits cognizable only by a Small Cause Court. Small Cause Courts have been given very wide powers indeed with regard to decisions on questions of fact. A District Judge has no kind of authority to interfere with the proceedings of a Small Cause Court. It does not seem to me to be logical to suggest that the discretion of the Small Cause Court on the question whether a suit is of such a nature that the plaintiff in that suit should be made liable to prosecution under the Penal Code, should be fettered by interference by the District Court. I am of opinion that the District Judge had no power to entertain the applications made to him in this case. I therefore set aside, as without jurisdiction, the order made by the District Judge granting the sanction.

V.S./R.K.

Order set aside.

A. I. R 1916 Patna 54

ROE AND JWALA PRASAD, JJ.

Harihar Misser—Plaintiff—Appellant.
v.

Syed Mohammed and others—Defendants—Respondents.

Appeal No. 2301 of 1914, Decided on 23rd May 1916, from Appellate decree of Dist. Judge, Muzffarpur, D/- 20th May 1914.

Limitation Act (1908), Art. 62—Suit for money paid to one for use of another—Limitation is three years from date of payment.

Money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money within the meaning of Art. 62 paid to that party for the use of the actual person in whom the

right to receive it vests and, therefore, a suit to recover such money must be brought within three years of the date of its payment; 17 I. C. 351, *Foll.*; 32 Cal. 527, *Ref.* [P 56 C 1]

Saroshi Chandra Mitter—for Appellant.

Baikuntha Nath Mitter—for Respondents.

Judgment—In this case a preliminary objection is taken that the appeal has abetted, and no order has been passed under O. 22, R. 11, read with R. 9 setting aside that abatement. The appellant died on 29th August 1915, and the application made for substitution before the Registrar was filed on 6th March. It is petent, therefore, that when that application was made to the Registrar the appeal had actually abated and should have been struck off the file, to be restored only after proceedings in due form under R. 9, O. 22. The application for substitution was therefore made in wrong form. It appears to have been treated however, by the Registrar as an application for the restoration of the appeal upon the file; notices were issued to the respondents, and they did not put in any objection before the Registrar to the hearing of the appeal. We have therefore in considering this application, dealt with it as an application to set aside an order of abatement, and having regard to all the facts of the case, are satisfied that the appellant was prevented by reasonable cause from making the substitution in due time. We therefore direct that the abatement be set aside and the appeal heard upon its merits.

The facts of the case upon the merits are, that the appellant was the purchaser in auction-sale of a revenue-paying estate. He defaulted in payment of the revenue, and almost immediately after his purchase the estate was again brought to sale. The original owner remained on register D as the proprietor of the estate, no attempt being made by the plaintiff to obtain substitution of his name. Taking advantage of this fact, the defendant withdrew the sale-proceeds lying in the Collectorate. The plaintiff, therefore, instituted this suit for the recovery of the money paid to the defendant by the Collector. The plaintiff instituted his suit more than three and less than six years from the date of the payment. There has been a definite finding of fact by the lower Courts that the position of the plaintiff was such

that he could not possibly have been kept out of knowledge of the payment to the defendant, and his right to sue thereon, by any fraud of the defendant. The sole question for decision is—Does Art. 62 or Art. 120, Lim. Act apply? The argument of the learned vakil for the appellant is, that it cannot be said that money has been paid to the defendant for the use of the plaintiff, unless there was a deliberate intention on the part of the defendant to accept the money for the plaintiff's use. He contends that Art. 62 is inapplicable. In putting forward this argument the learned vakil has the whole case-law of India against him. It is not a question of the defendant's intention in taking the money. He undoubtedly intended to rob the plaintiff and intended to keep the money for his own use. But this is not the point. The point is, for whose use did the party making the payment intend the money? The greater number of the cases before us are suits upon mortgage-deeds, in which the right of the plaintiffs was known to the mortgagor paying money in redemption, and this, in fact, was the position in the case of *Mahomed Wahib v. Mahomed Ameer* (1). An attempt is made to distinguish that case and the analogous cases from the present case, on the ground that the Collector, who paid the money to the defendant, neither knew nor cared anything about the plaintiff's rights.

A case actually in point is before us in *Lachmi Narain v. Dhanukdhari Prasad Singh* (2). This was a decision by a Division Bench of the Calcutta High Court, and it is binding upon this Court until dissented from by a Full Bench. We are in entire agreement with the conclusions arrived at in that case. The Collector, though he may have been ignorant of the plaintiff's rights, paid the money to the defendant, not because he was the owner, but because under S. 31, Act. 11 of 1859, he was bound by law to pay the money to the recorded proprietor or his heirs or representatives. The Collector must have been fully aware of the right of the owner to ultimately recover and enjoy the money. We must take it as reasonable to suppose that he handed the money to the defendant with the intention that it should be made over to the real owner, if indeed that real owner was other than the recorded pro-

1. (1905) 32 Cal 527.

2. (1912) 17 I C 351.

prietor. We are of opinion, therefore, that not only is the case governed by the case that we have quoted, but also that that case is in accordance with the whole trend of case-law throughout the Courts of India, that money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Art. 62, paid to that party for the use of the actual person in whom the right to receive it vests. The appeal is dismissed with costs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 56**

CHAMIER, C. J. AND JWALA PRASAD, J.

Raghunandan — Decree-holder — Appellant.

v.

Jugal Kishore — Judgment-debtor — Respondent.

Appeal No. 198 of 1916, Decided on 21st December 1916, against appellate order and decision of Addl. Dist. Judge, Manbhum, D/- 10th April 1916.

(a) Civil P. C. (1908), O. 3, R. 4—Subsequent execution — Vakalatnama filed with application for execution—Fresh vakalatnama is unnecessary for subsequent execution.

Where there is already on the file a vakalatnama in favour of a vakil under which he has filed an application for execution of a decree, no fresh vakalatnama is needed for a subsequent application. [P 56 C 2]

(b) Limitation Act (1908), Art. 182 (5)—Application of transferee—Receiver appointed in execution—Transferee of decree applying to Court to order Receiver to make payment of applicant—Application operates to save limitation.

Where a Receiver has been appointed in execution proceedings, an application by a transferee of the decree praying the Court to order the Receiver to make payments to the applicant is an application to the executing Court and operates to save limitation within the meaning of Art. 182 (5), Lim. Act. [P 56 C 2]

Atul Krishna Ray—for Appellant.*Achalandra Nath Das*—for Respondent.

Chamier, C. J.—This is an appeal by the decree-holder against an order of the Additional Judge of Manbhum, reversing an order of the Subordinate Judge of Manbhum. The Additional Judge has dismissed the present application because a previous application of 6th June 1912, which was relied upon for the purpose of saving limitation, was not signed by the decree-holder or by a pleader duly authorized in that behalf. It is true that that

application was not accompanied by a vakalatnama, but there is already on the file a vakalatnama in favour of the vakil under which an application had been made to the Court on 21st April 1911. If that previous application of 21st April 1911, was an application for execution, it is obvious that no further vakalatnama was required. It is said that that previous application cannot be treated as an application for execution, because thereby the applicant merely informed the Court that he had purchased the decree and prayed that the Receiver who had been appointed in the case should be ordered to make payments to him. That application was followed by the application of 6th June 1912, which was to the effect that as the Receiver had no money which he could pay to the decree-holder, the decree-holder wished to be allowed to execute the decree.

It is said that we should treat the Court which appointed the Receiver and the Court which was executing the decree as two separate Courts, although in point of fact the Court which appointed the Receiver was the Court executing the decree. It appears that the property was about to be sold when the Receiver was appointed and the Receiver was given six months' time within which to pay the sum decreed. When subsequently the decree-holder applied to the Court that the Receiver should pay money to him, his application must be taken to have been made to the Court which was executing the decree. In my opinion there is nothing in the suggestion that the previous applications were not applications made to the Court executing the decree, and I think that the Additional Judge was wrong in rejecting the present application for execution on the ground that the previous application was not one presented according to law. I would allow this appeal, set aside the order of the Additional Judge and restore the order of the Subordinate Judge with costs here and in the lower appellate Court. Hearing fee in this Court one gold mohur.

Jwala Prasad, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 57

MULLICK AND ATKINSON, JJ.

Romesh Chandra Mandal—Appellant.

v.

Bhuyan Bhaskar Mahapatra and another—Respondents.

First Appeal No. 486 of 1914, Decided on 18th July 1916.

(a) Hindu Law—Joint family—Money belonging to joint family advanced—All members of joint family must be joined as partners to recover advance.

Where money belonging to a joint family is advanced to a debtor, in a suit to recover the loan all members who represent the family must be joined as plaintiffs in order to entitle them to succeed in recovering the money as joint family property. [P 57 C 2]

(b) Hindu Law—Joint family—Money advanced—Afterwards half share was awarded to the plaintiff in arbitration—Plaintiff can recover half only.

Where a loan was advanced out of joint family property which was subsequently made the subject of arbitration and a half share in which was awarded to the plaintiff :

Held : that the plaintiff was entitled to recover by suit only half the amount of the loan. [P 58 C 1]**(c) Principal and Agent—Agent with widest powers—Contracting loan for principal—Principal after knowledge not repudiating is bound to repay loan—Contract Act (1872), S. 226.**

Where an agent, endowed with the widest powers and authorised to buy and sell property, to deal with Government and to pay revenue contracted a loan on behalf of his principal, and the latter did not repudiate the loan when it came to his knowledge :

Held : that the principal was bound by the act of his agent and was liable for the repayment of the loan. [P 58 C 2]*Baikuntha Nath Dutt*—for Appellant.*Biswanath Sinha*—for Respondents.**Atkinson, J.**—This is an action brought by the plaintiff to recover Rs. 9,863-8-0 for principal and interest due on three separate notes of hand. The first note is dated 22nd July 1908 for Rs. 5,000 and carries interest at 9 per cent the second note is dated 8th November 1909 for Rs. 1,000 and the third is dated 5th May 1910 for Rs. 1,000. The first was made by the defendant with the plaintiff's father and in respect of the first note for Rs. 5,000 defendant 1 offers no defence on the merits. As to the two subsequent notes of hand amounting to Rs. 2,000 in all, these notes were made by defendant 2 who was the agent and manager of defendant 1's property. Two defences are set up for the purpose of repudiating liability for the entire debt. The first defence

applies to the first two notes, namely, that the money advanced on the two notes of hand dated 22nd July 1908 and 8th November 1909 was the money of the joint family of which the plaintiff's father was the head, and that thus it being joint property, all the joint members of the family must be joined as plaintiffs in the action to entitle the plaintiff to succeed in recovering the amount due on this debt from defendant 1. This argument does not apply to the Rs. 1,000 under the note of hand of 5th May 1910 for that admittedly was a sum advanced by the plaintiff to defendant 2 himself and was in no way connected with the two other transactions between the plaintiff's father and defendants 1 and 2. The second defence put forward is as to the two notes for Rs. 1,000 each raised by defendant 2. These, it is said were transactions in which defendant 2 was not acting as the lawful agent of defendant 1 and that he had no authority to raise money on behalf of defendant 1 and consequently defendant 1 is not liable for any portion of such debt. In dealing with the first argument put forward, let us see how the matter stands. The only oral evidence given as to whether the money advanced was or was not the joint property of the plaintiff's family at the time the advances were made is the evidence of the plaintiff himself. If the matter rested on his evidence alone, it would be very strong and conclusive to show that the property was not joint property but that the money advanced was the sole property of plaintiff's father.

The learned Subordinate Judge, however seems to have misconceived the true position of affairs, because he says that it was unnecessary for the purpose of this action to determine the rights of the several cosharers inter se; and he comes to no express finding on this aspect of the case. We think in this respect the learned Judge has erred in law because it is quite clear that if the money that was advanced was the joint property of all the members of the plaintiff's family the members who now represent the joint family would have to be joined as plaintiffs, to entitle them to succeed in recovering the money as joint family property. The evidence which is so strong in this case is the solenamah of 1910 a document that cannot be impeached, and it is almost conclusive as to the rights of

the parties. It shows the condition of things existing at the time of the plaintiff's father's death when the property was divided or partitioned. It is quite clear that the plaintiff himself was the objector claiming a division of the property, as joint family property, and he instituted proceedings and eventually agreed that the rights and liabilities of the family should be determined by certain arbitrators in respect of the properties claimed as joint property as well as all other moveable and immovable properties belonging to his father and alleged not to be joint. And the properties which were the subject-matter of the arbitration are set out categorically in para. 2 of the award, and by this document it appears that all the landed property, the money lending, the paddy-lending business and so forth of the plaintiff's father (the father of the objector) were declared to be the property of each member of the joint family in the following proportion, namely that the plaintiff should be entitled to eight-annas share and the other plaintiffs eight-annas share between them. The plaintiff's evidence in this matter is untrustworthy, when he says that the arbitrators only ascertained the shares of the family in respect of 11 mouzas but not in respect of any other property, movable or immovable. The document itself contradicts the plaintiff's evidence most emphatically, and also the additional evidence which he gave stating that his uncles were not members of the joint family. Therefore, we hold that the advances that were made on foot of the two first notes were the joint property of the plaintiff's family. After the arbitration proceedings were effected the property became free and was no longer the joint property of the family, and the plaintiff became entitled by the award to eight-annas share of what had been originally joint property.

Therefore, if we decide that the plaintiff is entitled to recover he will recover only in respect of an eight-annas share of the debt due on the note for Rs. 5,000, and the note of Rs. 1,000 dated 8th November 1909. He cannot recover the full sum secured by these two notes. As to the question of agency I think defendant 1's defence on this aspect of the case is one quite unworthy of credit. I think it is an exceptionally dishonest defence, because defendant 1 himself, for

whose benefit this money was raised, was apparently a careless man and entrusted the management of his business to others and he entrusted his agent, defendant 2, with the widest powers possible. He held him out to the world as his agent. He endowed his agent with powers to sell and buy property, authorized him to deal with the Government, pay revenue and so forth. Nobody can read the power-of-attorney itself and not be impressed by the wide and extensive powers conferred upon the agent. But after all the great test in judging a case of this kind is to see what was the attitude and conduct of the man who seeks to repudiate liability, at the time when he ascertained for the first time that a debt had been contracted by his agent on his behalf. The money was given to and received by his agent and defendant 1 had knowledge of the fact in July 1911.

The plaintiff demanded in July 1911 payment of the entire debt from the defendant after the death of his father. Defendant 1, in response to the demand for payment, stated that the two hand notes for Rs. 1,000 each would not be barred, as the hand note for Rs. 5,000 would, if no payment were made on foot of some, be barred, and that he, defendant 1, would make a payment on foot of it to save limitation. And he did there and then make a payment of Rs. 100 on foot of the note for Rs. 5,000 and with knowledge of the existence of the debt of Rs. 2,000 due on foot of the two hand notes dated 8th November 1909 and 5th May 1910. This conduct on the part of defendant 1 would in itself amount to a ratification of defendant 2's agency, and the contract he made on behalf of his principal. It is not certainly a repudiation of the acts of defendant 2 in raising this money on behalf of his master. Taking the evidence oral and documentary, we are of opinion that defendant 2, acted as the agent of defendant 1, in raising this money, and that he raised this sum of Rs. 2,000 on 8th November 1909 and 9th May 1910 for the purpose of discharging a debt due by his master, and in respect of which his master has received the benefit thereof and that defendant 1 never at any time prior to the institution of this suit repudiated the obligations incurred by defendant 2 on his behalf in securing both these sums of Rs. 1,000 each. Consequently we shall give a decree for a sum

less than the sum claimed: eight-annas share as to the note for Rs. 5,000 with interest at 9 per cent. per annum; eight-annas share in the note of hand, dated 8th November 1909, with interest at 6 per cent; and we declare the plaintiff entitled to recover the full sum of Rupees 1,000 with interest at 6 per cent. on foot of the hand note dated 5th May 1910. Interest on the decretal amount for which the plaintiff is to have judgment to be at the rate of 6 per cent. until payment.

Mullick, J.—I concur. I have only to add that in my opinion the learned Subordinate Judge should have decided the question, whether the amounts of the three hand-notes belonged exclusively to the father of the plaintiff, and in declining to come to a decision upon that point he adopted an unsatisfactory mode of trial.

V.S./R.K. *Appeal partly allowed.*

A. I. R. 1916 Patna 59

ROE AND JWALA PRASAD, JJ.

Amar Dayal Singh and others—Plaintiffs—Appellants.

v.

Bishun Chand Sahu and others—Defendants—Respondents.

Second Appeal No. 712 of 1914, Decided on 25th May 1916, from decision of J. C., Chota Nagpur.

(a) **Landlord and Tenant—Mauza Garhwa—Transfer of house—There is no custom by which maliks are entitled to malikana at 25 per cent.**

There is no custom in Mauza Garhwa whereby the maliks in that village are entitled to realise malikana at 25 per cent. of the consideration money in every case in which a house in that village is sold. Where the maliks claimed malikana at the rate of 25 per cent and the defendants admitted that it was payable at the rate of 2 per cent:

Held: that the admission of the defendants did not relieve the plaintiffs from the burden of proving the custom as alleged by them, and that on failure of such proof their suit must be dismissed. [P 68 C 2]

(b) **Civil. P. C. (1908), S 100—Failure to appreciate document is no ground for second appeal.**

Per Roe, J.—Failure of the lower appellate Court to appreciate a document put in evidence is not a ground for second appeal. [P 60 C 1]

Mrityunjay Lal and Kulwant Sahay—for Appellants.

P. R. Das and Baikuntha Nath Mittra—for Respondents.

Roe, J.—This is an appeal from the decision of the Judicial Commissioner of Chota Nagpur, dismissing the plaintiffs'

suit for a declaration that a custom exists in Mauza Garhwa whereby the maliks of the village have a right to realise malikana at 25 per cent. of the consideration in every case in which a house in that village changes hands. The learned Judicial Commissioner finds as a fact that it is not proved that all the cosharers are in the habit of realizing salami and it is not proved that salami at 25 per cent is invariably realized, and that it is not stated or proved that the custom is of realization from the vendor or the vendee. For the respondents it is urged that the findings of fact preclude the appeal. On behalf of the appellants six reasons have been put forward for holding that the case is one in which the lower appellate Court should be directed to reconsider its decision upon the facts.

The first is that the finding is based on inaccurate quotation from the evidence; second, that there was a failure to appreciate the force of the admissions made by the defendants that a custom did exist whereby a salami of 2 per cent was paid on transfer of a house; third, failure to appreciate the effect of orders made by successive Deputy Commissioners of Palamu upon this custom; fourth, that no distinction has been made by the Judicial Commissioner between the evidence relating to the existence of this custom before and after the date of the Deputy Commissioner's order; fifth, failure to appreciate the value of conclusive proof on the record that the Government itself as owner of khas mahals in this village has on one occasion at least accepted its share of the salami paid at the rate of 25 per cent of the consideration money at an auction-sale; and sixth, failure to appreciate the probative force of the existence of this custom in the statements made in the orders by the Deputy Commissioners of Palamu, and that it is clear that the Judicial Commissioner's finding was based upon the fact that there must have been at least 150 sales during the last 20 years, and that there was no justification for such a statement. All save one of these arguments appear to me to be an ingenious way by which a finding of fact is assailed in second appeal. Mr. Lyall's statement and Mr. Hignell's statement are not admissible in evidence, in the absence of those witnesses. If it was desired to use the statements made by them in their orders passed in 1907 they should have been put

into the witness-box. With regard to the first argument there is nothing that I can see in the judgment which can be classed as an inaccurate statement. The one quoted is to be found in para. 1 of the judgment. It appears that some years ago a Deputy Commissioner, in consequence of a complaint with reference to the admitted realization of 25 per cent. by the maliks, issued an executive order to the effect that tenants were only to pay 2 per cent. It is suggested by Sir Ali Imam that what actually happened was that the Deputy Commissioner Mr. Hignell in 1907 was informed of this custom by his khas mahal Deputy Collector and flatly refused to accept on behalf of Government any profit from a custom which he regarded as monstrous. On examination of the record it appears that definite evidence by the defence had been given that the orders of Mr. Hignell were passed on a definite complaint made by Khudi Singh. It was open to the Judicial Commissioner to accept this as the origin of the proceedings.

The fifth argument, failure to appreciate the document Ex. 7, I cannot accept as a ground for second appeal. If this Court is to start its work in this Province on the suggestion that it is bound to go into the whole of the evidence in every record and see whether every line has been appreciated or not, it will be saddled with the duty of considering every decision of fact in second appeal. The only real argument of weight taken is that, when the learned Judicial Commissioner found no proof of a steady payment of this salami for the last 20 years, what he should have done was to take the orders passed by Mr. Hignell and Mr. Lyall in 1907 as an interference with the established custom and should have put out of his mind, as the learned Munsif put out of his mind, the fact that there had been a discontinuance of the custom since 1907 and devoted his attention solely to the question whether it was proved that prior to 1907 there had been invariably a custom whereby salami at this rate had been paid. It may be that the learned Judicial Commissioner might with advantage have framed his findings in this sense. But the fact was before him that there was to be expected a great change in conditions between the period prior to 1907 and the period subsequent to 1907. This is clear from the fact that a

great part of the Munsif's judgment is devoted to the consideration of this change of conditions. What the learned Judicial Commissioner has actually found is that "all the plaintiffs witnesses are interested persons; all depose to the custom and give many instances, but in only one case is there any documentary evidence adduced in support. The plaintiff does not allege whether the custom is that the payment is made by the vendor or the vendee. Several witnesses were examined who stated that it was the vendee who made the payment."

The custom is neither fixed nor settled. The Judicial Commissioner goes on to say that

"the only sanction which the maliks possess in order to enforce payment is the refusal of dakhil kharaj. Under these circumstances it is not reasonable to suppose that the vendees invariably comply with the demand and the witnesses' evidence indicates that they do not do so."

It is clear that the learned Judicial Commissioner arrived upon a consideration of these facts at the conclusion that the existence of this custom during the last 20 years had not been proved by any reliable evidence; it was shown to have been in abeyance for the past eight years, and not proved to have existed for the previous 12 years. In this view of the matter the suit was rightly dismissed. The appeal should be dismissed with costs.

Jwala Prasad, J.—The plaintiffs' suit is based upon a custom said to have existed in Mauza Garhwa whereby the maliks in that village have a right to realise malikana at 25 per cent. of the consideration money in every case in which a house in that village is sold. The defendants, on the other hand, deny this custom of paying 25 per cent. as haq malikana to the malik. The plaintiffs must therefore clearly establish this custom set up by them as being ancient, certain, reasonable and invariable before they can succeed in the case. The lower appellate Court has held on examination of the documentary and oral evidence on the record that the plaintiffs have failed to establish such a custom. The plaintiffs in this appeal contend that the lower appellate Court has failed to appreciate the effect of the admission made by the defendants that a custom did exist whereby a salami of 2 per cent was paid on transfer of a house. The admission of the defendants, if any, does not relieve the plaintiffs from the burden of proving that the custom as alleged by them of the right of the malik to receive 25 per cent exists. The question is not whether there is a "custom to receive 25

per cent.", as is contended to have been admitted by the defendants. The custom set up is a custom to receive 25 per cent. and the plaintiffs must prove this custom. This is purely a question of fact, and prima facie the decision of the learned Judge is conclusive on the point. It has not been shown that the lower appellate Court has acted upon any illegal evidence or has disregarded any evidence of the plaintiffs. It appears that the learned Court below has carefully considered all the evidence in the case and has come to the conclusion that the custom of receiving 25 per cent. has not been proved. The appeal must therefore fail and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

*** A. I. R. 1916 Patna 61**

ROE AND JWALA PRASAD, JJ.

Gokul Nath Jha—Judgment-debtor—Appellant.

v.

Pran Mal Marwari and others—Decree-holders—Respondents.

Misc. Civil Appeal No. 182 of 1916, Decided on 27th November 1916, against order of Dy. Commr., Sonthal Parganas, D/- 10th April 1916.

*** Civil P. C. (1908), O. 34, R. 1 and S. 47—Suit on hand note decreed in terms of compromise—Compromise entitling plaintiff to recover decretal amount from property given as security—Such property cannot be sold in execution—Compromise.**

In a suit for recovery of money due on a hand-note a compromise was effected in the following terms:

"Till the realization of the entire decretal amount with costs and interest, the defendants have given as security the undermentioned property for which a separate registered bond has been executed... In default of one instalment the petitioner shall be bound to pay the entire amount of the decree with costs and interest, etc. The plaintiffs shall be entitled to realize their dues on all the instalments, firstly, from property given in security and afterwards... from the petitioners' persons and other properties."

A decree was passed in terms of the compromise:

Held: that by virtue of O. 34, R. 1, the property given in security could not be sold in execution of the consent decree: 30 Cal 1060, Dist.; 22 Cal 859, Foll.; 3 I C 999, Ref.

[P 62 C 2]

Saroshi Chandra Mitra—for Appellant.

Naresh Chandra Saha—for Respondents.

Jwala Prasad, J.—This appeal arises out of an order of the Deputy Commis-

sioner of the Sonthal Parganas, dated 10th April 1916, confirming an order of the Subordinate Judge, dated 31st January 1916, directing the execution of a decree obtained by the respondents on 20th December 1911, and the sale of property in execution thereof. The respondents had brought a suit in the Court of the Subordinate Judge to enforce their claim in respect of money due from the appellants on a hand-note. On 18th November 1911 during the pendency of the suit, the appellants executed a registered mortgage-bond in favour of the respondents, pledging the property now pursued as security for the repayment of the debt. On 20th December 1911 the parties filed a petition of compromise, the terms of which were based upon the terms of this mortgage-bond. It was agreed that a decree be passed in favour of the plaintiffs-respondents against the defendant-appellant for Rs. 4,000, principal and interest. The decretal amount was to be paid by instalments set forth in the petition of compromise. The property which has in the present proceedings been advertised for sale was pledged as security for the payment of the instalments. Para. 4 of the compromise petition recites as follows:

"Till the realization of the entire decretal amount with costs and interest the defendants have given in security the undermentioned property, for which separate registered bond dated 18th November 1911 has been executed which is filed herewith for the perusal of the Court. We hereby promise that in default of one instalment your petitioners shall be bound to pay the entire amount of the decree with costs and interest, etc., till the date of realization. The plaintiffs shall be entitled to realise their dues on all the instalments, firstly, from property given in security and afterwards in case of the property not being sufficient from your petitioners' persons and other properties. But if the first two instalments are paid on the dates fixed, then in case of the default in the other kist the plaintiff will realise that kist alone with interest."

On 20th December 1911 the Court passed a decree in favour of the respondents for the sum agreed upon between the parties in terms of the compromise petition. No instalment due on the compromise petition was paid and the decree-holders-respondents applied for the execution of the decree for the entire sum due to them by attachment and sale of the property pledged as security in the consent decree. Both the Courts

below have allowed the execution to proceed, directing the attachment and sale of the property. The judgment-debtors have appealed to this Court. The sole question is, whether the decree as it stands can be executed and the property pledged in security can be attached and sold in execution of the decree or the respondents should bring a separate suit and obtain a proper mortgage decree. The Courts below have proceeded on the assumption that there was a condition in the decree that the decretal amount was, in case of default, to be realised by attachment and sale of the property in question. I, however, do not find any clear direction either in the compromise petition or in the decree that in default of payment of the instalments the decree-holder is entitled in execution of the decree to attach or sell the property in question. Para. 4 of the petition of compromise quoted above in extenso will show that the property in question is only offered as a security for the payment of the instalments in the terms of the mortgage-bond of 18th November 1911. The parties compromised the suit on the basis of a separate mortgage-bond already executed by the judgment-debtor. The decree-holder cannot proceed against the property unless he brings a proper suit on the basis of the mortgage-bond. The ruling reported as *Shyam Sundar Lal v. Bajpai Jainarayan* (1) does not apply to this case, as the decree-holder in that case was not the mortgagee and the security bond for the due performance of the decree was given by the defendant in favour of the Court by its order under S. 545 of the then Civil Procedure Code. The ruling clearly says that

"if he (decree-holder) be such a mortgagee, no doubt he cannot sell the properties comprised in the mortgage without obtaining in the first instance a decree under the provisions of S. 67, T. P. Act."

In this case the decree-holder is a mortgagee under the mortgage-bond. The ruling reported as *Abhoyessury Debee v. Gouri Sunkur Panday* (2) clearly applies to this case, as there is no direction in the consent decree or in the compromise petition for the sale of the property. This view is supported by *Kissory Lal Chowdhury v. Raja Sewbux Bogla* (3),

where it is observed at p. 790 (of 13 C. W. N.) that

"if the consent decree had not contained a direction that the property charged should be sold for non-payment, this application would have failed on the authority of *Abhoyessury Debee v. Gouri Sunkur Panday* (2). Had that decree fallen short of declaring that sale should take place under certain contingencies, it is clear that a separate suit should have been necessary."

The respondents are, therefore, not entitled to attach and sell the property in question in execution of the decree and the order of the District Judge is bad and should be set aside. The appeal is allowed with costs.

Roe, J.—I agree. The mortgage being prior to the compromise decree, the debt arises out of the mortgage. Therefore under O. 34, R. 14, the mortgaged property cannot be sold. The plaintiff-respondent must institute a regular suit for the realization of the amount due to him. The appeal is decreed with costs. Hearing fee five (5) gold mohurs.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 62

SHARFUDDIN AND ROE, JJ.

Puncha Thakur and another—Plaintiffs—Appellants.

v.

Bindeswari Thakur and others—Defendants—Respondents.

Second Appeal No. 3828 of 1912, Decided on 21st December 1916, against decree of Offg. Addl. Sub-Judge, Mozaffarpur D/- 7th October 1912.

(a) Custom—Essentials of stated.

Custom, in order to prevail against the general law, must be proved to be immemorial, reasonable, certain and continued without interruption since its immemorial origin. 1 *Mad* 235 (P C) and *A I R* 1915 *Cal* 161 *Ref*.

[P 64 C 1]

(b) **Hindu Law—Religious Endowment—Temple—Ancient—Intention of founder—Presumption—Transfer of right to receive offerings made to temple is against public policy and void—Custom.**

Where the origin of a foundation is lost in antiquity, then unless a custom to the contrary is established, it must be presumed that the original founder intended, in making his delegation of the powers of worship to certain persons, that those powers should remain in their hands for the good of the temple and the convenience of the public, and that it is against public policy that persons to whom those powers of worship have been delegated should of their own free will make a delegation of those powers to a third party.

[P 64 C 2]

1. (1903) 30 Cal 1060.

2. (1895) 22 Cal 859.

3. (1909) 31 C 999.

In the case of such a foundation a custom permitting alienation is not established by six undisputed transfers. [P 94 C 2]

A transfer of the right to receive offerings made to a temple is, therefore, void as against public policy. 1 *Mad* 235 (P C); 9 *M I A* 344 (P C); 1 *C W N* 493 and *A I R* 1915 *Cal* 161 *Ref.* [P 64 C 2]

(c) **Estoppel—Transfer invalid cannot be avildated.**

Where a transfer is contrary to public policy, neither party can make it legal by creating estoppel. [P 64 C 2]

Lachmi Narain Sinha and *Baidya Nath Narain Sinha*—for Appellants.

Gour Chandra Pal—for Respondents.

Roe J.—The property in dispute in this case is a three-annas share in the offerings made to the temple of Sri Bhaironathji in the District of Mozaffarpore. This three annas belonged to the plaintiffs' family and was mortgaged by the plaintiff's father, who is still alive, to the defendants second party. A suit was instituted upon the basis of this mortgage and the three annas share was put up for sale and purchased by the defendants second party, who took out delivery of possession on 18th January 1901 and a few days after transferred the property purchased to the defendant 1st party. On 11th April 1911, the plaintiff instituted the present suit for a declaration that the sale (transfer?) made by the father was void as against him and that, therefore, the whole share transferred from his father's hands into the hands of the first defendant through the second defendant should be restored to the plaintiff. The ground taken for this suit was that the plaintiff's father had no right to mortgage the plaintiff's interest in this share of the offerings and that the mortgage itself and the mortgage decree were illegal and void, for the reason that the offerings were not transferable and the second party who was not either a panda or pujari could not acquire any right in it. The lower Courts concurred in holding that the property transferred by the plaintiffs' father was inalienable and that, therefore, the transfer was void. A plea of estoppel had been set up by the defendants on the ground that the plaintiff's father having led the mortgagee to believe that the property was alienable his son cannot be heard to say that it was inalienable. On appeal to the High Court at Calcutta it was held by my learned brother sitting with Cox J., that the property transferred was with-

out doubt inalienable and that statutory provisions being against the transfer, no question of estoppel would arise. An application for review was made against this judgment and admitted to hearing, on the ground that there was no statutory bar to the transfer of such a right as was transferred in this case and that there had not been by the lower Courts a sufficiently full inquiry into the origin of rights transferred by the plaintiff's father.

The case again comes before this Court, the whole question having been laid open by the order admitting the petition for review. I have no hesitation in concurring in the conclusions arrived at in the previous judgment. I venture only with respect to suggest that in the last lines of that judgment for the words "statutory provisions" the words "public policy" should be read. My reasons for this opinion are based largely upon the decision in the Privy Council case of *Rajah Vurmah Valia v. Ravi Vurma Kunhi Kutty* (1). The actual facts surrounding the present endowment are lost in antiquity. No man can say who built the temple in which these offerings are made and no man can say who were the original priests to whom the right to conduct worship and receive offerings was delegated. All that we do know is that in the memory of man there have been six operative transfers of shares in the right to receive offerings and this is the seventh and is the first in which the right of the pujaris to transfer their interest in future offerings has been contested. We are asked to remand the case that all these points might be gone into. But a remand for taking off fresh evidence should only be made in very special circumstances, and it is clear that no further light can be thrown upon the origin of the temple and appointment of pujaris and it must be presumed that out of the seven instances of transfer only one, the one before us has been disputed before the Court. The case is in many respects similar to the Madras case upon which my opinion is based. There the original endowment had been lost in antiquity the original founder was unknown, his original intentions in appointing a person to hold the office of the priest could not be ascertained. Their Lordships of the Judicial Committee made the following

1. (1876-78) 1 *Mad* 235=4 *I A* 76 (P O).

observations upon a position of this nature:

"The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district open to the public opinion of that district, and having that sort of family interest in the maintenance of this religious worship which would ensure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties with all the property of the trust to a single individual who might act according to his sole discretion and might have no connexion with the families from which the trustees were to be taken."

Further they went on to say at p. 250:

"Custom must prevail against the general law. That such would be the consequence of a well proved and established custom their Lordships do not deny. In the present case, however, the civil Judge has distinctly found against the existence of the custom".

That case and the case of *Ramasawmy Aiyar v. Venkata Achari* (2) are good authority for the proposition that where it is shown that a particular office has been by custom alienable it is not against public policy that such transfers should take place and as I read the decision in the latter case the alienation of the right of the pujari in that particular case was confined to persons of the same class as the transferor and equally capable with them of performing a due turn of worship. In the case of *Srimati Mallika Dasi v. Ratnamani Chakervarti* (3) it was distinctly laid down that the right to perform a turn of worship and receive offerings during that turn was alienable. And in *Mahamaya Debi v. Haridas Haldar* (4) that proposition was not denied. What was asserted in that case was that prima facie the transfer of such an office was opposed to public policy but yet upon proof of a custom extending beyond the memory of man and not in itself unreasonable it might be said that considerations of public policy no longer oppose the transfer. In the particular case then considered that custom was proved to be immemorial reasonable, certain and continued without interruption

since its immemorial origin. The principle therefore, upon which the present case should be decided is this that the origin of the foundation being lost in antiquity it must be presumed that the original founder intended, in making his delegation of the powers of worship to the ancestors of the plaintiffs, that those powers of worship should remain in their hands for the good of the temple and for the convenience of the public, and that it is against public policy that persons to whom these powers of worship have been delegated should of their own free will make a delegation of those powers to a third party. Before that principle can be overridden it must be shown that there is a custom immemorial, unbroken, reasonable, and certain. It is impossible for us to hold that by six undisputed transfers a custom immemorial, unbroken, reasonable, and certain has been proved. I would therefore, hold that the mortgage made by the father of the present plaintiff in favour of defendant 2 was void as against public policy and that the sale in execution of that mortgage was equally void. Where a transfer is contrary to public policy neither party can make it legal by creating estoppel. In my view the appeal should be again dismissed with costs throughout.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 64

MULLICK, J.

Muhammad Rafi—Defendant — Appellant.

v.

Muhammad Askari—Plaintiff — Respondent.

Second Appeal No. 3633 of 1913, Decided on 27th April 1916, from decision of Sub-Judge, Saran, D/- 27th June 1913.

Civil P. C. (1908), O. 34, R. 1—Suit by prior mortgagee and purchase by him of property in execution—Puisne mortgagee subsequently obtaining decree and purchasing same property—Prior mortgagee suing subsequent mortgagee for declaration of title and confirmation of possession—Defendant claiming redemption—Right to be redeemed continued till confirmation of sale only—Omission of defendant's name in execution proceedings did not nullify sale in execution—T. P. Act, S. 74.

Plaintiff-mortgagee obtained a decree on foot of his mortgage, and in execution thereof purchased the property in dispute, and obtained delivery of possession. Subsequently, defendant, puisne mortgagee, obtained a decree against the

2. (1861-63) 9 M I A 344=2 W R 21 (P C).

3. (1897) 1 C W N 493.

4. A I R 1915 Cal 161=27 I C 400=42 Cal 455.

same property, in execution purchased it himself and got registration of his name in the Collectorate register. Plaintiff sued for declaration of title and confirmation of possession, or in the alternative for recovery of possession. Defendant set up a right to redeem plaintiff's mortgage and also alleged that he was not bound by the sale in execution of the latter's decree, as his name did not appear in the execution proceedings:

Held: (1) that defendant's right to redeem continued up to the confirmation of sale in plaintiff's favour; (2) that the omission of defendant's name from proceedings in execution of plaintiff's decree did not render the sale a nullity and that the defendant was therefore, bound by it: 31 Cal 863; 25 Bom 337 (P C), *Rel on*; 32 Cal 296 (P C), *Dist.* [P 65 C 2]

Muhammad Fakhruddin—for Appellant.

Khurshaid Husain—for Respondent.

Judgment.—The plaintiff is a prior mortgagee in respect of a four annas four-pies share in Mouza Nawadih, which was the property in suit. He got a decree upon his mortgage-bond on 31st May 1897, brought the property to sale, purchased it himself on 4th July 1900, and obtained delivery of possession. The defendant is the father of one Amir, who was a second mortgagee not only of Nawadih, but also of another property. Amir appears to have died after delivery of possession to the plaintiff and the defendant appears to have obtained a decree upon Amir's mortgage on the allegation that Amir was his benamidar. The date of the defendant's decree is 8th April 1902. He alleges that he executed the decree, bought the property at auction and obtained registration of his name in the collectorate. The plaintiff sues declaration of title and confirmation of possession or in the alternative for recovery of possession, dating his cause of action from 4th February 1911, on which date he came to know that the defendant's name had been registered in the collectorate.

The Munsif decreed the suit, but he gave the defendant permission to redeem by paying the plaintiff Rs. 81-2-3 with interest from 31st May 1897 (the date of the plaintiff's decree) up to 4th July 1900 (the date of his purchase). In appeal the Subordinate Judge also decreed the suit, but he has held that the defendant was not now entitled to redeem as he had not done so before the order absolute in the plaintiff's mortgage suit. The present second appeal is preferred by the defendant. The Munsif found that Amir was not the benamidar of the defendant. There was a cross-appeal on this point

before the Subordinate Judge which has been dismissed without adjudication, because the learned Subordinate Judge has assumed the position most favourable to the defendant, namely that Amir was really his benamidar. If Amir was not the benamidar of the defendant, the defendant is obviously a trespasser and has no title to the property. But upon the assumption made by the learned Subordinate Judge, let us see whether the learned Subordinate Judge is right. The learned Subordinate Judge states that the defendant was bound to redeem before the order absolute. This view, in my opinion, is wrong. The right of redemption continued till the confirmation of sale: *Bibijan Bibi v. Sachi Bewah* (1). The defendant next contends that as no notices were issued upon him in the execution proceedings in connection with the decree on which the plaintiff bases his title, he is not bound by the sale and by the plaintiff's purchase, which passed to the plaintiff only the right, title and interest of the mortgagors and not the defendant's equity of redemption.

He relies upon *Khairaj Mal v. Daim* (2). But the reason of decision in that case was that the person whose property was sold was not at all a party to the suit, and their Lordships of the Privy Council observed that a sale held in execution of a decree in a suit not properly constituted is not voidable but is a nullity. In the present case Amir was a party to the suit and the decree was obtained after service of summons upon him. The omission of his name in the execution proceedings was merely an irregularity. The sale, even though the mortgagee creditor was himself the purchaser, could not be considered a nullity. *Malkarjun v. Narhari* (3) is conclusive authority upon this point, although in that case the purchaser was a third party. The defendant's only remedy was by an application to set aside the sale under the provisions of the Civil Procedure Code, but such an application would now be barred. He might also have brought a suit for redemption, but that also would be barred. As his right to redeem is barred, he ought not to be allowed to exercise that right as a defendant in the present suit for recovery of possession. In my opinion the

1. (1904) 31 Cal 863.

2. (1905) 32 Cal 296 = 32 I A 23 (P C).

3. (1901) 25 Bom 337 = 27 I A 216 (P C).

plaintiff's sale being a valid sale and binding upon the defendant, the defendant has no answer to the suit. The decision of the learned Subordinate Judge decreeing the suit is correct and the appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 66 (1)

CHAPMAN, J.

Mahtab Khan—Defendant—Appellant.

v.

Sheobarat Teli—Plaintiff—Respondent.

Second Appeal No. 37 of 1916, Decided on 1st November 1916, from decision of Sub-Judge, Arrah, D/- 21st August 1915.

(a) **Bengal Tenancy Act (1885), S. 103 B**—Court can consider history of proceedings resulting in particular entry in Record of Rights.

The statutory provision in S. 103 says nothing as to the value to be attached to an entry in the Record of Rights; it only says that the entry must stand and be presumed to be correct until it is proved by evidence to be incorrect.

[P 66 C 2]

It is open to a Court to consider the history of the proceedings which have resulted in a particular entry in a Record of Rights. [P 66 C 2]

(b) **Evidence Act (1872), S. 101**—Onus immaterial.

The question of the burden of proof is only a question of procedure and where the evidence has been fully recorded on both sides and the Court has only to adjudicate upon it, no such question arises. [P 66 C 2]

Chandar Sekhar Prasad Singh—for Appellant.

Bimla Charan Singh—for Respondent.

Judgment.—This appeal arises out of a suit for a declaration of title and for recovery of possession of an agricultural holding.

The plaintiff did not obtain the actual admission of any document in support of his case. He produced the evidence of certain witnesses. The defendant relied upon an entry in the Record of Rights and also produced certain witnesses. The Original Court, relying upon the entry in the Record of Rights, dismissed the plaintiff's suit. The Court of First Appeal reversed this order and decreed the suit. Against the decree a second appeal has been made to this Court, and in support of the appeal, it has been said that the First Court of Appeal wrongly placed the burden of proof upon the defendant, and that it did not give effect to the presumption provided for in S. 103-B, Ben. Ten. Act, which is to the effect that an entry in the Record of Rights must be

presumed to be correct until the contrary is proved by evidence. The third contention is that the learned Judge, in estimating the value of the entry in the Record of Rights, went into the history of the proceedings which resulted in that entry, and that he was not entitled to do this. So far as the question of the burden of proof is concerned, the Courts have had recently the assistance of the labours of specialists in the history of the law of evidence and now the question of the burden of proof remains only a question of procedure. The plaintiff had to begin his case and to produce evidence and clearly the burden of proof was laid down upon him. In determining the case subsequently upon the evidence on both sides it is not possible to say that any question of the burden of proof arose.

In regard to the presumption in favour of the Record of Rights, the contention fails upon a similar ground. There was evidence to rebut the presumption and that evidence was believed by the learned Subordinate Judge in a very carefully considered judgment. In regard to the third point, it is not possible to say that it is not open to the Court to consider the history of the proceedings which have resulted in a particular entry in a Record of Rights. On the contrary it is often of the greatest value to very carefully consider the history of those proceedings, for the history is frequently of the greatest assistance in enabling the Court to estimate the value which should be attached to an entry in the Record of Rights. The statutory provision in S. 103-B, Bengal Act, says nothing as to the value to be attached to an entry in the Record of Rights; it only says that that entry must stand and be presumed to be correct until it is proved by evidence to be incorrect. It says nothing as to the strength or value of the evidence necessary to rebut the presumption.

The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 66 (2)

JWALA PRASAD, J.

Sehat Ali—Petitioner.

v.

Farzand Ali—Opposite Party.

Civil Revn. Case No. 159 of 1916, Decided on 28th November 1916, against judgment of Sub-Judge, Purneah, D/- 8th July 1916.

Provincial Small Cause Courts Act (1887), S. 17—Bullock attached in execution of Small Cause Court decree—Application for setting aside *ex parte* decree—Certain person remaining surety for whole amount—Bullock released—Application dismissed—Surety is liable for whole amount—Civil P. C. (1908), S. 145.

In execution of a decree of a Court of Small Causes, the decree-holder attached a bullock belonging to the judgment-debtor. The latter applied to set aside the *ex parte* decree, and the petitioner stood surety on his behalf for the whole decretal amount. The bullock was released. On the dismissal of the application for setting aside the decree, the surety produced the bullock and contended that his liability had come to an end:

Held: that the surety was liable for the full amount of the decree under S. 145. [P 67 C 2]

R. L. Dutta—for Petitioner.

Muhammad Mustafa Khan—for Opposite Party.

Judgment.—An *ex parte* decree was obtained by the decree holder on 10th June 1915, in the Court of Small Causes at Purneah and was put into execution on 16th August 1915. A bullock belonging to the judgment-debtor was attached and brought into Court for sale. On the same date the judgment-debtor applied for stay of the sale which was granted by the Court and the cattle attached was released to the judgment-debtor. The judgment-debtor, on the same date, applied for re-hearing of the case and for setting aside the decree *ex parte* obtained against him under O. 9, R. 13, Civil P. C. The decree being of a Small Cause Court, the application to set aside the *ex parte* decree and for a review of the judgment had to be accompanied by either a deposit in the Court of the amount due under the decree or by giving security to the satisfaction of the Court for the performance of the decree or compliance with the judgment under S. 17, Provincial Small Cause Courts Act, 9 of 1887. In accordance with this section the judgment-debtor filed a surety bond executed by the petitioner in this case. In the surety bond the petitioner stood as security for payment of the entire decretal amount Rs. 170 odd in case the re-hearing of the petition of the judgment debtor was disallowed. This petition is dated 16th August 1915. At the foot of the bond there is a further undertaking given by the petitioner to produce the attached cattle in Court. On 10th January 1916, the judgment-debtor's application for re-hearing was dismissed. On 19th January 1916, the surety produced the cattle in Court and prayed for

his being discharged from surety. The cattle was sold for Rs. 11 and the sale proceeds were appropriated towards part satisfaction of the decree. On 29th April 1916, notice was issued upon the surety, the petitioner in this case, to show cause why he should not pay the entire decretal amount according to the conditions laid down in the surety bond. On 27th May 1916, an objection was filed by the petitioner alleging that as he had produced the cattle which was attached he was not liable for the entire decretal amount on 8th July 1916, the Court rejected his objection and allowed the execution to proceed against him.

The petitioner has, therefore, come to this Court in revision to have the order of the Court below set aside. It is contended on his behalf that he was surety only for the production of the cattle and that as soon as he produced the cattle his liability under the bond ceased. But looking into the terms and conditions set forth in the surety bond it is clear that he stood surety not only for the restitution of the cattle attached in that case, but also for payment of the entire decretal amount. It was upon the basis of the surety bond as required by S. 17, Provincial Small Cause Courts Act, that the judgment-debtor's application for re-hearing was entertained and registered. That application having been dismissed, the surety is clearly liable for the entire decretal amount under S. 145, Civil P. C. The contention of the petitioner is, therefore, overruled and the rule is discharged with costs. Hearing fee one gold mohur.

V.S./R.K.

Rule discharged.

A. I. R. 1916 Patna 67

MULLICK, J.

Kalru Garhi and others—Defendants—Appellants.

v.

Jangli Chowdhri and others—Plaintiffs—Respondents.

Second Appeal No. 2676 of 1913, Decided on 8th May 1916, from decision of Dist. Judge, Bhagalpur, D/- 12th May 1913.

Landlord and Tenant — Non-occupancy raiyat's interest is heritable.

In the absence of custom a non-occupancy raiyat's interest is heritable: *A I R 1914 Cal 757, Foll.* [P 63 C 1]

Susil Madhab Mullick for *Sailendra Nath Palit*—for Appellants.

Judgment.--The first party plaintiffs are the landlords; the second party plaintiffs are lessees from the first party. The first party defendants are the heirs of one Masudan who was a non-occupancy raiyat in respect of the lands in suit. The second party defendants are transferees of a portion of the non-occupancy holding from the first party. The plaintiffs sued for ejectment, on the ground that Masudan having died and the holding not being heritable they were entitled to re-enter. Both the Courts below decreed the suit in full with mesne profits against all the defendants. The present second appeal is preferred by the first party defendants only. The Courts below have proceeded on the view of the law that was supposed to be the correct view before the case of *Midnapore Zamindari Co. v. Hrishikeshi Ghosh* (1), but the Full Bench in that case decided that in the absence of custom a non-occupancy raiyat's interest was heritable. The plaintiffs are bound by this decision which, although passed subsequent to the decision of the learned District Judge against which the present second appeal has been preferred, states the law as it has always been since the passing of the Bengal Tenancy Act. The plaintiffs, therefore, have no cause of action and the whole suit must be dismissed with costs in both the lower Courts. The second appeal before me is allowed without costs, as there is no appearance for the respondents.

V.S./R.K.

Appeal allowed.

1. A I R 1914 Cal 757=41 Cal 1108=25 I C 562.

A. I. R. 1916 Patna 68

CHAPMAN, J.

Karu Singh and another—Appellants.
v.*Mt. Bibi Nasiban and others*—Respondents.

Second Appeal No. 395 of 1916, Decided on 3rd November 1916, from decision of Dist. Judge, Patna, D/- 3rd July 1916.

Landlord and Tenant—Ejectment—Defendant admitting landlord's title but pleading that he was assignee from tenant and not bound to quit must show that he has right to resist landlord's entry

Where in a suit in ejectment the defendant acknowledges the landlord's title but pleads that the defendant is the assignee from the tenant and is not bound to quit, the onus is on him to show that he had a right to resist the landlord's entry.

The mere fact that the plaintiff has failed to prove a special case set up by him, though it may be a point in defendant's favour, does not relieve the Court from finding affirmatively on the evidence whether the defendant has a right to resist the landlord's entry. [P 68 O 2]

Purendra Nath Sinha and Sivnandan Rai—for Appellants.

Mohammad Tahir—for Respondents.

Judgment.—The subject of this suit is certain land upon which huts or houses have been built in Mokamah. The landlords alleged that they allowed one Musan to occupy the land and the homestead. On the death of Musan the landlords allowed Musan's sons, defendants 3 and 4, to remain in the property. In October 1913 the two sons of Musan left the village and migrated elsewhere. The plaintiffs went to take possession when they were opposed by a person named Nasiban, who claimed under a transfer from the two sons of Musan. The landlords were unable to eject Nasiban and accordingly had recourse to the Court. The learned Munsif dismissed the suit upon the ground that the two sons of Musan had permanent and transferable rights in the land. The learned District Judge in appeal has expressly refrained from deciding as to the nature of the right to the land held by Nasiban or before her by the sons of Musan. The learned District Judge has disposed of the case in the following sentence:

"The plaintiffs' case is based on an allegation of a conditional settlement made about fourteen years ago, and that having broken down, they cannot shift their ground and throw the burden of proof as to the permanent nature of the grant on the defendants."

The case was contested by the defendant Nasiban alone. Now, it being conceded that the plaintiffs are the proprietors of the land, it was for the transferee Nasiban to make out her right to resist the plaintiffs' entry on the land. The mere fact that the plaintiffs tried to make out a particular case and failed might be a point to set up in favour of the defendant Nasiban's case: but it did not relieve the Judge from finding affirmatively on evidence that the defendant, the transferee Nasiban who resisted, had a right to resist the entry of the plaintiffs on the land. I may note that in the Record of Rights the entry in the column "status" is a word 'gair mazrooa' from which I infer that the persons in occupation of the land were not recorded by the Survey Officers as having either an occu-

pancy or a non-occupancy right in the land. It may be that the tenancy was transferable but there must be a finding to that effect. The result is that I set aside the judgment and decree of the learned District Judge and remand the appeal to the District Judge for a fresh decision. Costs will abide the result.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 69

ATKINSON AND KINGSFORD, JJ.

Nawagarh Coal Co. Ltd.—Plaintiffs—Appellants.

v.

Behari Lal Trigunait and others—Defendants—Respondents.

First Appeal No. 401 of 1913, Decided on 11th May 1916, from decision of Addl. Sub-Judge, Manbhum, D/- 4th June 1913.

(a) **Mineral Rights**—Permanent tenure-holders cannot enjoy mineral rights without grant of sub-soil, ownership in surface and sub-soil being in grantor—Before he makes grant of surface rights to another, presumption arises that there is severance of surface rights—Grantor's right resembles that of simple free-holder owner in England—Grantor is entitled to enter land for reasonable exercise of mineral rights—Law governing free-holds is applicable where mineral rights are reserved to grantor.

In the absence of an express grant of the sub-soil, permanent tenure-holders, even if their estate be hereditary, do not enjoy the mineral rights and the same are not vested in them.

[P 73 C 1]

Where, prior to the date of a grant of land, both the ownership and the right of property in the surface as well as the sub-soil were vested in the grantor as one entire tenement, the presumption is that, at the time of the grant there was a severance of the surface rights from the property in the sub-soil. The surface rights with their incidents become vested in the grantee and the mines and minerals in the grantor as owner of the sub-soil as if there had been a reservation of them in his favour. The grantor's rights are the same as those of a fee simple freehold owner of land in England who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom: 37 Cal 723 (P C); 39 Cal 696 (P C); A I R 1914 Cal 205 Ref.

[P 73 C 1]

By reason of the said presumption and of the severance of the tenement and the reservation that must be deemed to arise in favour of the grantor, the latter has the right by implication to enter on the land for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights.

[P 73 C 1]

The principles of the law governing free holds and not copyholds should be applied to the case. It is only under the copyhold law where there is no reservation or custom proved that a deadlock occurs and neither landowner nor tenant can work the mines. Under the law applicable to free hold land, there can be no deadlock, for if the

mines be excepted, the grantor has an implied right to work them as incidental to such exception: if there be no exception, then that right is with the grantee as the owner of the surface and sub-soil: *Eardley v. Granville*, (1876) 3 Ch D 82; *Disappr*; *Eatten Pool v. Kennedy*, (1907) 1 Ch D 256; *Ramsay v. Blair*, (1876) 1 A C 701, Ref.

[P 73 C 2]

(b) **Mineral Rights—Damage to owner of surface while exercising mineral rights**—Court can prevent grantor from causing damage.

If, in working the mines and extracting the minerals, the grantor or his assignees cause damage to the owner of the surface, there is ample power in the Court to injunct them and prevent them from so doing.

[P 75 C 1]

(c) **Grant—Presumption of lost grant in favour of person can be made only when actual user is exercised by him.**

The presumption of a grant in favour of a person in the nature of a lost grant, which means presuming a lawful origin to support long and continuous user and enjoyment of the property, can be made only on the basis of the actual user exercised and enjoyed by such person.

[P 71 C 1]

Where the original sanad or grant is lost or not produced, and the evidence establishes only user by the grantee as permanent tenure-holder of the surface rights of a mouza by cultivation of land, building of houses or excavation of tanks, no presumption can be made in his favour of a lost grant to exercise mineral rights in the mouza.

[P 71 C 2]

(d) **Landlord and Tenant**—“Moghuli” appearing in rent receipt has doubtful meaning.

The term “moghuli” appearing in a rent receipt is a word of doubtful meaning and at best imports no more than that the rent assessed represented a proportion of the Government revenue.

[P 71 C 2]

S. P. Sinha, N. N. Sarkar, P. R. Das, B. Basu, Manmath Nath Mukerji, Kunj Bihari Sen, Durga Charan Banerji, Uma Chandra Lala and Panna Lal Chatterji—for Appellants.

Pugh, A. Sen, Lalit Mohan Ghose, Sisir Kumar Mitra and Lalit Krishna Mittra—for Respondents.

Judgment.—This is an action in which the Nawagarh Coal Company, Limited, as plaintiffs, claim a declaration of their title in the underground mines and mineral rights in Mouza Kumarjuri, which rights, they allege, became vested in them under a lease dated 2nd October 1899. This lease was granted to plaintiffs by the Deputy Commissioner of Manbhum as Manager on behalf of the Raja of Katras, and it purports to demise to the plaintiffs all the mines and the mineral rights in the sub-soil of 22 mouzas which are set forth in the lease itself, subject to the restrictions and conditions therein contained. The second part of

the plaintiffs' claim is conversant with a claim for a declaration that they should be entitled to enter upon the mouza of Kumarjuri and prospect for and work all such mines and minerals as may be found there; and that the defendants may be restrained by injunction from hindering or preventing them from exercising the legal rights which they claim to possess relative thereto. The Raja of Katras is the zemindar or proprietor of parganna Katras and that fact is not disputed. At the time when this lease was granted in 1899, his property was being administered under the Encumbered Estates Act and the lease was granted by the Deputy Commissioner of Manbhum under the Act as the Manager on behalf of the Raja. It was the duty of the Deputy Commissioner to manage the estate until such time as the Raja himself was released from his disqualification and became entitled to enjoy the rents and profits of his property; and it appears that immediately after the estate had been discharged from the operation of the Encumbered Estates Act, the Raja himself approved of and confirmed the lease of 2nd October 1899 granted by the Manager in favour of the plaintiffs.

We have stated shortly what the plaintiffs' case is, and we shall now set forth similarly the various defences put forward. The defendants' first claim is that they were granted by one of the Raja's predecessors-in-title, by a document dated 21st March 1830, a moghuli brahmottar grant of the Mouza Kumarjuri; and that by that grant they became permanent tenure holders; and that all rights in the surface and in the sub-soil of this village were vested in them under and by virtue of that grant; and that they had for all purposes in this mouza a permanent and hereditary interest, subject to the payment of a small moghuli rent of Rs. 17 per annum; that by that grant they were entitled to exercise all the mineral rights in the sub-soil and that they were in fact the owners of the mines. They also claim to be owners of Mouza Chitudih, but as to this mouza we can find no document of title. They claim that they have been in possession of Chitudih in the same way and under the same tenure as Kumarjuri. This will be apparent in the first place from the statement in Ex. R, the patta of 1891 made by the Trigunait in favour of Doctor Saise, at line 5, p. 691

of the paper-book, and in the second place, from desposition of Behari Trigunait at line 12, p. 763. However, the significant thing is, that with regard to Chitudih they do not claim the mineral rights; and for fifteen or sixteen years the plaintiffs in this suit have been, as admitted by Bihari at line 10, p. 763, of his evidence, in possession of that village by working coal there without let or hindrance from the defendants. The sanad of 1830 upon which the defendants base their claim is not forthcoming. It appears from the judgment of the year 1890 by the Road Cess Deputy Collector, Ex. 6, p. 40, that the document was produced before him and that he disbelieved its genuineness. His judgment was upheld by two appellate Courts. The Trigunait witnesses affirm that this sanad was made over to the agents of the East India Coal Co. in 1899. According to one witness, it was made over to Messrs. Smith and Turnbull; according to the other, it was made over to Kapileswar and Makhan. None of these four persons have been called to corroborate that evidence, and if it were true, the Assistant Manager of the East India Coal Co., who was a witness for the defendants, would, undoubtedly, have been in a position to produce the document.

What he did produce was the copy, Ex. L, and it appears from his deposition at p. 749 that it was this copy, and not the original sanad which was made over to his company by the defendants. This copy was made in the year 1891. The conclusion from these facts is, that the original document was suppressed by the defendants. In any case there being no evidence of its loss, the Subordinate Judge rightly refused to admit the copy as evidence, or to allow secondary evidence of its contents to be given. Now as to the nature of the interest of the defendants in Kumarjuri, it was contended by the appellants that the defendants were merely tenants of the cultivated land. There, is however, no suggestion throughout the evidence, oral and documentary, to the effect that the Raja was ever in possession of any portion of the village during the last 80 years, with the exception of an obviously unreliable statement by the witness Durpan Lal at p. 790. There can be no doubt whatever that throughout this period the defendants and their predecessors have held the entire village as a tenure under the Raja. The phaisala

of 1835, Ex. T-1, at p. 706, the Raja's goshwara paper of 1843, Ex. 41 at p. 36, and the Raja's road cess returns of 1898 and 1910 are conclusive upon this point. The documents indicate that since the year 1835 the Trigunaita have consistently claimed the village as their brahmottar, whereas the Raja has variously described the tenure as ijara and jama and the village as mal or rent-paying, in contradistinction to brahmottar.

It appears clear that the rent has remained the same throughout the period of the defendants' occupation. There is no plea in the defendants' written statement of a lost grant; and we are asked now, by reason of their failure to establish legal proof of their title, to presume a grant in their favour on the basis of a lost grant. They have never asked that their written statement might be amended with reference to any such claim; and the fact that the learned Subordinate Judge found a lost grant in favour of the defendants was the work of his own fertile imagination rather than the wish and desire of the defendants. However, if we are asked now, as we have been asked and pressed strongly by Mr. Pugh, to presume a grant in favour of the defendants in the nature of a lost grant, which means presuming a lawful origin to support long and continuous user and enjoyment of property, we are of opinion that we should presume a grant on the basis of the user exercised and enjoyed by the defendants. The alleged user of the defendants of certain mineral rights is hazy, uncertain and unsatisfactory. However, fortunately documents do not lie; and as we have been pressed to presume a grant in defendants' favour we think we should presume the following grant: namely, a grant to the defendants, as permanent tenure-holders, of the surface rights only of Mauza Kumarjuri. Whether they are brahmottardars or not is by no means certain. The papers indicate that almost continuously from 1835 this claim has been strenuously contested and, except for one entry in the books of the Raja, there seems very little to show that they were brahmottardars. The jama-bandi of 1890 has an entry in it in which mention is made of a brahmottar and that is admitted, and that seems to be the high water-mark of the strength of the evidence upon which the defendants can rely in support of their claim. We shall

not determine whether they are brahmottardars or not. Mr. Pugh attaches great significance to the use of the word moghuli in some of the rent receipts. Moghuli is a word of doubtful meaning and at the best imports no more than that the rent assessed upon the defendants represented a proportion of the Government revenue.

The user which the defendants have enjoyed is very accurately set forth in their own statement at pp. 663 and 664 of the paper-book. This document is dated 12th June 1890 and is "the humble petition of Behari Lal Trigunait," one of the defendants in this action. It was filed as an answer to the claim of the zamindar at the time to the underground rights in both Kumarjuri and Chaitudih; and in para. 2 the defendants carefully define what their user has been, and they say that there are no coal mines in the said two mauzas.

"But it will be satisfactorily proved that the mauzas have all along been in our possession by the use and occasional sale of coal that is seen on the surface."

There is, however, no oral evidence of any sale. The defendant Behari Trigunait, while asserting that he takes coal for fuel, admits at p. 763 of his evidence that the mouth of the pit has been closed. The evidence suggests at the most that the defendants have taken small quantities of coal from the outcrop for domestic purposes and for burning lime alone; and for no other purpose. That does not, to our minds, appear to convey the impression that they ever exercised the mineral rights in the mauza. On the other hand it is clear that the coal they used was that seen on the surface of the incline near the river. We are satisfied that the defendant's user of the mauza was merely confined to the enjoyment of the surface rights whether by cultivation of land or building of houses or excavation of tanks. One other matter as to the user of the defendants is of importance. On 27th July 1890 a question arose as to who was liable to pay cess on the value of the minerals of this Mouza Kumarjuri. The Raja contended that he was the owner and liable for the cess; the defendants contended that they were the owners and liable for the cess; and they relied, then as now, upon this grant of 21st March 1830. Mr. Pugh wants us to refer to this judgment only to see what

had been decided, and not for the purpose of examining the grounds and reasons for the decision. We decline to yield to that contention and we consider we are entitled to look at the conclusions and reasons upon which that judgment was based. It was held by the Deputy Collector, twice affirmed on appeal, that the mineral rights of this Mouza Kumarjuri were not vested in the defendants but that they were vested in the Raja, and that the Raja alone was liable for cess.

Defendants' second contention is that even if they have not got the mineral rights vested in them but merely the surface rights, and even if the mines and the minerals are vested in the Raja, he (the Raja) cannot work them—nor can his assignees work them—without the defendants' consent because they being the tenure-holders of the surface, have the right to exclude any person who enters upon their land without their consent. We shall deal with this aspect of the defendants' case at a later stage. The third defence put forth by the defendants is that arising under the Statute of Limitation, but this has not been expressly pleaded.

Now prior to and at the time of the grant Mouza Kumarjuri was vested in the Raja and his predecessors as zamindars. If a grant is to be presumed in favour of the defendants it must be consistent with their user. The mineral rights were never in contemplation of the parties in 1830, nor do we believe the defendants ever exercised any mineral rights whatsoever. Thus we have a grant by the zamindar of the surface rights of a village containing 380 bighas at the abnormally low rent of Rs. 17 per annum and we must presume, in the absence of the original document, having regard to the evidence before us, that only the surface rights were conveyed to the defendants as presumed grantees. We think that it has been conclusively held by the Privy Council that in such a case the mines and minerals and the property in the sub-soil remain, and must be presumed to remain, the property and in the possession of the zamindar. At any rate, prior to the date of the grant both the right of property and ownership in the surface and the right of property and ownership in the sub-soil were vested in the zamindar. At the

time of the grant there must be presumed to have been a severance of the surface rights from the property in the sub-soil. The surface rights with their incidents became vested in the defendants as tenure-holders; and the mines and minerals in the Raja as the owner of the sub-soil.

If there was any doubt as to the interpretation to be put upon the decision of the cases of *Hari Narayan Singh Deo v. Sriram Chakravarti* (1) as decided by the Privy Council, it has been entirely removed by the decision of the Privy Council in the later case of *Durga Prasad Singh v. Brojo Nath Bose* (2), in which it was laid down finally and conclusively, in a case almost identical in its facts with the present one, that it must be presumed that the mines and mineral rights remain the property of the Raja as zamindar thereof and that the same are thus vested in him assuch. In this connexion it is of vital importance to notice that in the case of *Sriram Chakravarty v. Hari Narayan Singh Deo* (3) the Subordinate Judge who tried the case made a declaration in favour of the Raja, declaring him entitled to the underground minerals, and awarding him khas possession of the same. This was the order upheld on appeal by the Privy Council, and I think their Lordships clearly intended to decide that as the zamindar was entitled to the sub-soil mineral rights, he was also entitled to possession of the same.

This is the law, and legal effect can only be given to it by holding that at the date when the grant was made, or is presumed to have been made, there was a severance of the right and property in the surface from the right and property in the sub-soil, both of which had antecedently been vested as one entire tenement in the Raja and his predecessors as zamindars. Mr. Pugh sought to contend that on the facts of this case the character of the defendants' tenure is such that it could be distinguished from the cases of *Hari Narayan Singh Deo v. Sriram Chakravarti* (1) and *Durga Prasad Singh v. Brojo Nath Bose* (2), but we think that the decision of Fletcher, J., in the case of *Kunja Behari Seal v. Raja*

1. (1910) 37 Cal 723 = 6 I C 785 = 37 I A 126 (P C).

2. (1912) 39 Cal 696 = 15 I C 219 = 39 I A 133 (P C).

3. (1906) 33 Cal 54.

Durga Prasad Singh (4), prevents him from taking advantage of any such argument and that in fact having regard to the Privy Council cases to which I have referred, permanent tenure-holders, even if their estate be hereditary, do not enjoy the mineral rights and the same are not vested in them. Therefore, if there be a severance in the tenement, the tenure-holder taking the surface rights, the rights in the sub-soil must be taken to remain in the zamindar as if there had been a reservation of the mines in his favour; otherwise it would be impossible to give legal effect or meaning to the decisions of the Privy Council. If the mines are presumed to be vested in, and to be the property of, the Raja, his rights must be just the same as those of a fee simple freehold owner of land according to English law who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom.

We hold that by reason of that presumption and by reason of the severance of the tenement and the reservation that must be deemed to arise in favour of the Raja, the latter had, as incident to his rights of property and ownership in the mines, the right by implication of law to enter upon the surface of the tenure-holder's mouza for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights. Mr. Pugh argued that even though we may hold that the mineral rights remain in the Raja, nevertheless his clients, the defendants, being in possession of the surface, could prevent the landlord from working the mines without their (the defendants') consent; and he has relied very strongly on Mukerjee, J's, judgment in *Prince Mahomed Buktyar Shah v. Rani Dhokamani* (5), in support of that argument; and certainly that judgment at first sight would give one the impression that he was right. But we feel satisfied that the learned Judge in some way misapplied the English law governing copyholds to that applicable to the case of owners and tenants of freehold land in England.

A copyholder has certain rights in excess of the ordinary tenant of freehold land. The case referred to, *Eardley v. Granville* (6), clearly distinguishes bet-

ween the rights of a copyholder and the rights of an ordinary lessee or tenant on a freehold estate. A virtual severance having been affected by the exception of the mines, the lessee or grantee of the surface gets no possession of the sub-soil. It is, therefore, the principles of freehold and not copyhold law which are to be applied, the distinction being, that under the latter there is no division into strata and the tenant obtains possession of the entire surface and sub-soil to the centre of the earth, so that the lord of the manor cannot work the mines unless he proves a right or custom to that effect. It is this distinction which appears to us to have been lost sight of by Mookerjee, J., in the ruling under reference. It is only under the copyhold law, and where there is no reservation or custom proved, that a deadlock occurs and neither landlord nor tenant can work the mines.

Under the law applicable to freehold land, there can be no deadlock, for if the mines be excepted, the grantor has an implied right to work them incidental to such exception; if there be no exception then that right is with the grantee as the owner of the surface and sub-soil. The case of *Batten Poole v. Kennedy* (7) clearly shows that where a tenement is severed, the person in whose favour the reservation is made is the absolute owner of the sub-soil; and in *Ramsay v. Blair* (8) the rights of such a person are clearly dealt with and laid down and it is there stated that he has by implication of law the power to go upon the surface and do all things reasonably necessary in order to exercise the enjoyment of his property. Sir S. P. Sinha's argument on the first aspect of the case has convinced us of its soundness and accuracy. The third defence put forward by the defendants was one of adverse possession. They claim to have been in adverse possession so long that even if they are not entitled by grant, they have succeeded in prescribing a title for themselves as against the Raja as their landlord. However on the question of fact we have no difficulty in disposing of this issue. We think that the defendants in December 1891, in making a lease of the mineral rights of Kumarjuri to the Walter Saise, were demising property of which they were not the owners and over

4. A I R 1914 Cal 205 = 42 Cal 346.

5. (1905) 2 C L J 20.

6. (1876) 3 Ch D 826 = 45 L J Ch 669.

7. (1907) 1 Ch. D 256 = 76 L J Ch 162.

8. (1876) 1 A C 701.

which they had no control; and if his assignees, the East India Coal Company, did enter and work the coal mines, as they apparently did in 1895, they did so as trespassers and not under a legal claim or title. Thus up to 1899 they were in possession as trespassers and from 1899 onwards they were not in possession of the mines or minerals up to March 1911, when the acts were committed giving rise to the cause of action in this suit.

The Subordinate Judge has, we think, dealt with the plaintiffs' evidence of possession in a somewhat intemperate and unreasonable manner. The witness Fleischer was no doubt in some respects unreliable, but his evidence regarding the possession of the Nawagarh Company of the Mouza Kumarjuri from 1899 to 1904 as corroborated by the cash books is of a most convincing nature. These books are clearly genuine and they exhibit a series of payments for excavation of inclines, erection of huts and other purposes indicative of occupation by the plaintiff company during that period. There is documentary evidence showing that the company was put into possession of the village under the orders of the Deputy Commissioner in March 1899, and the order of the High Court in April 1900 at p. 710 indicates that the company was at that time in possession. Subsequent to 1904 the company do not appear to have exercised any possessory rights upon the surface of the village, but they were extracting the coal in Kumarjuri from an incline in the neighbouring village of Malkera. Under these circumstances, and in view of the fact that there was no adverse possession by the defendants, no cause of action arose until the plaintiff was obstructed in March 1911. The defendants can only succeed in establishing adverse possession by the joint act of themselves and the East India Coal Company. Thus it will be seen that from March 1899 to March 1911 neither the defendants nor the East India Coal Co. worked, or sought to work, the coal or mineral rights in Kumarjuri. It appears to us, therefore, perfectly clear that the defendants have acquired no title by adverse possession to the mines or minerals of Kumarjuri.

Are the plaintiffs entitled to succeed in this action? The Raja has the mineral rights as we have held, in the village of Kumarjuri; he has, as incident to that

right, the right to go upon the land and take the minerals; and has by the lease of 2nd October 1899 assigned to the plaintiffs all the rights which he himself possessed. That lease gives the plaintiffs, during the term to which it extends, all the rights of the Raja to the mines and minerals coupled with the legal implication which should be attached to these rights, viz., a right to enter on the surface of the mouza by way of necessity to work the mines. It is contended for the defendants that by the express terms of the lease itself there are certain restrictions and conditions imposed which prevent the plaintiffs from working the mines; and that therefore they are not entitled to the declaration sought in this action. The argument is that by Cl. 3, Part 2, of the lease the plaintiffs have merely power and liberty to enter upon lands in direct possession of the Raja himself in order to exercise the mineral rights vested in them; and that accordingly by this clause the plaintiffs' rights were strictly limited and by no means co-extensive with those the Raja enjoyed. The implied liberty to enter and work the mines subject to reasonable restrictions is not to be curtailed by the express conditions of the lease, unless the intention is apparent. That the intention was to enlarge, and not to restrict, is indicated by the fact that, if the lease were construed in the manner contended by Mr Pugh, the lessees would obtain thereunder no rights whatever in the village by reason of there being no land in the Raja's khas possession. In our opinion, Cl. 3 of Part 2 merely determines the compensation to be paid to the Raja in the event of the plaintiffs' acquiring land, whether permanently or temporarily, in connexion with their mining operations. The clause, therefore, was inserted with totally different object from that for which Mr. Pugh contends.

Part 3 is headed "Restrictions and conditions as to the exercise of the above liberties, powers and privileges." We think that Part 3 must be construed as only restricting the liberties and privileges conferred by Part 2, and not as any restriction upon the general right of access which is implied by law as between the Raja and the defendants and which right, so far as the Raja is concerned, is now vested in the plaintiffs. The cases of

Earl of Cardigan v. Armitage (9) and *Bartlett v. Downes* (10) are directly in point. Therefore, we think that the plaintiffs are entitled to the mineral rights under the lease of 2nd October 1899 and that they are entitled to enter the mouza of Kumarjuri to bore and do all acts reasonably incident to the enjoyment of their property in the mines and minerals, and that if in the development of the mines and the extraction of the minerals they cause damage to the defendants or others by subsidence of the soil or injury to the houses or tanks therein and thereon, there is ample power to injunct them and to prevent them from so doing. In our opinion, neither the Raja nor the East India Coal Co., are necessary to be joined as parties, to entitle the plaintiffs to maintain this action. On 21st March 1911 therefore the defendants illegally obstructed the plaintiffs in the exercise of their lawful rights and the plaintiffs are therefore entitled to the full measure of relief which they claim in this action. We accordingly set aside the judgment of the learned Subordinate Judge and decree the plaintiffs' suit in the form of prayer (1) in the written plaint and grant an injunction in the form of prayer (2), with costs of this action against the defendants in both Courts.

V.S./R.K. *Appeal decreed.*

9. (1823) 2 B & C 197=3 D & R 414.

10. (1825) 107 E R 861=5 D & R 526.

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SHARFUDDIN AND ROE, JJ.

Ganga Prasad—Plaintiff—Petitioner.
v.

Nandu Ram—Defendant—Opposite Party.

Civil Revn. No. 46 of 1916, Decided on 12th June 1916, against the order of Sub-Judge, Patna, D/- 17th March 1916.

(a) Civil P. C. (1908), S. 115—High Court can interfere if question is of jurisdiction—Government of India Act (1915) S. 107.

Under S. 115, Civil P. C. a High Court can only interfere if the question be one of jurisdiction. A High Court's powers under the Charter Act are ordinarily exercised only in cases where jurisdiction has been exceeded or a Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising a jurisdiction vested in him by law, and this power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right. [P 75 C 2 : P 76 C 1]

(b) Provincial Small Cause Courts Act (1887), S. 25—Discretion vested in Court

—High Court cannot interfere unless perversely exercised.

Where a discretion is vested in a Court, it is not open to interference by the High Court unless it has been exercised ignorantly or perversely. [P 76 C 1]

Fakhruddin and *Nirsu Narayan Singh*—for Petitioner.

Tribuban Nath Sahay—for Opposite Party.

Judgment.—In this matter we are asked to interfere either under S. 25, Small Cause Courts Act or S. 107, Government of India Act, with an order made by a Small Cause Court Judge under S. 23 (1), Provincial Small Cause Courts Act. The preliminary objection is taken that an order made under S. 23 (1) is not covered by S. 25. Two cases have been quoted, one on either side. In *Subal Ram Dutt v. Jagadanunda Mazumdar* (1) the judgment was one to which my learned brother was a party, I agree with the conclusions arrived at therein with regard to the meaning of the word "decided", even though in *Umesh Chandra Paladhi v. Rakhal Chandra Chatterjee* (2) its correctness was questioned. I would lay emphasis on the distinction between disposing of a case and deciding a case, but would concede that the meaning of the word "case", as commentaries on S. 115, Civil P. C. indicate, is not without difficulty. A case is something less definite than a suit, and it may be argued that a proceeding in which a Small Cause Court Judge discusses and decides the question whether a plaint should be returned may be regarded as constituting in itself a case. It is not in the matter before us necessary to go deeply into this question, for whether we regard ourselves as taking action under S. 25, Small Cause Courts Act or S. 115, Civil P. C. or S. 107, Government of India Act, the point in issue seems to me to be the same point.

Under S. 115, Civil P. C., we could only interfere if the question were one of jurisdiction. From the earliest days of High Court at Fort William when Norman, J., introduced superintendence to the notice of his colleagues as a term having "a legal force and significance well known to the Legislature", the Court's powers under the Charter Act have been exercised, with few exceptions, only in case where jurisdiction has been

1. (1909) 1 I. C. 288.

2. (1911) 10 I. C. 8.

exceeded or the Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising a jurisdiction vested in him by law. As I read the judgments in *Chandi Roy v. Kirpal Roy* (3) and in *Amjad Ali v. Ali Hussain Johar* (4), even this limited power should be exercised only when irreparable injury would be caused to one of the litigants if matters were not set right. In the case before us no irreparable injury is being caused. The plaintiff has been returned. The plaintiff has an ample remedy in the Courts of ordinary jurisdiction.

Nor would I interfere under S. 25, Small Cause Courts Act, had I power to do so. S. 23 (1) is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily, but in a Court in which the evidence is recorded in full and the decision open to appeal. The matter is one of discretion, and where discretion is vested in a Court, it is not open to our interference unless it has been exercised ignorantly or perversely. Whether we look at the matter from the point of view of superintendence or revision, the question in issue is whether the Judge has acted ignorantly or perversely. In *Umesh Chandar Paladhi v. Rakhal Chandra Chatterjee* (2), the Divisional Bench declined to believe that there could be any intricate question of title in a dispute over the carcass of a goat. In the case before us the suit is for house rent. If title in the house was in good faith disputed, the Judge would have been most unwise to adjudicate upon it summarily. The Judge heard the Pleaders and decided that the title of the plaintiff had been challenged in good faith. I see no reason for believing that his decision was either ignorant or perverse. The application should be rejected with costs—hearing-fee two gold mohurs.

V.S./R.K. *Application rejected.*

3. (1911) 10 I. C. 308.

4. (1907) 6 I. C. 574.

A. I. R. 1916 Patna 76

MULLICK, J.

Jogeswar Rai and another—Defendants
—Appellants.

v.

Kesho Persad Singh—Plaintiff—Respondent.

Second Appeal No. 3027 of 1914, Decided on 26th April 1916, from decision of Sub. Judge., Arrah, D/- 31st July 1914.

(a) **Landlord and Tenant—Suit for rent—All recorded tenants are necessary parties to suit.**

Ordinarily a rent suit is not properly constituted unless it is brought against all the recorded tenants. [P 77 C 1]

(b) **Landlord and Tenant—Joint tenancy—Presumption that each tenant is bound for whole rent does not arise.**

There is no presumption in Bihar that in every joint tenancy there is also a several promise by which each joint tenant agrees to be bound for the whole rent: 7 I. C. 840 and 6 C. W. N. 111, *Ref. 11 C. W. N. 1026, not Rel. on.* [P 77 C 1]

Plaintiff brought a suit for arrears of rent against three joint tenants of an occupancy holding, two of whom filed a compromise petition admitting the rate claimed, and a decree was accordingly passed. The third defendant got the decree set aside as against himself, on the ground that he had not been properly served. In a subsequent suit for arrears of rent against the same persons, he was again not served:

Held: (1) that the admission of the rate of rent claimed by the two defendants did not amount to a promise to pay the whole of the rent themselves; (2) that as the third defendant had not been properly served the suit must be dismissed. [P 77 C 2]

Mohammad Mustafa Khan—for Appellant.

Krishna Sahay, Pravas Chandra Mitter, Susil Madhab Mullick and Chandra Sekhar Prasad Singh—for Respondent.

Judgment.—The plaintiff is the landlord and defendants 1 and 2 are two brothers Jogeswar and Baleswar, who are minors represented by their uncle Gharbaran Rai, and defendant 3 is Ram Autar son of Madho Rai; all three defendants jointly hold an occupancy holding. In 1905 the plaintiff brought a suit against defendants 1 and 2 and Madho Rai for the rents for the years 1309 to 1311 Faslis at the rate of Rs. 136.6.0 per years. Defendants 1 and 2 appeared in that suit and filed a compromise petition accepting the rate claimed. A decree was accordingly passed at that rate, but Madho Rai subsequently brought a suit and got the decree as far as he was concerned set aside on the ground that he was not properly served. In 1909 the plaintiff again came

to Court and brought a suit for the arrears for 1312 to 1315 Faslis impleading defendants 1 and 2 and Madho Rai. All the three defendants contested the suit and admitted only a rental of Rs. 70. The Court finding that Madho Rai was not a party to the compromise by which defendants 1 and 2 had admitted the rate of Rs. 136-6-0, gave a decree only for the admitted rental of Rs. 70 and left the question of the real rate open. The present suit is the third and is laid against defendants 1, 2 and 3 and for the years 1316 to 1319 Faslis at the rate of Rs. 136-6-0. The Munsif decreed the suit at Rs. 70. On appeal the Subordinate Judge has decreed it at Rs. 136-6-0 against defendants 1 and 2 and has dismissed it as against defendant 3. The present second appeal is by defendants 1 and 2.

Now ordinarily a rent suit is not properly constituted unless it is brought against all the recorded tenants. It is found as a fact that defendant 3 has not been served in the present suit and therefore the suit cannot proceed, unless the plaintiff can show that there was a special contract between him and defendants 1 and 2 by which these defendants agreed to be responsible for the whole rent not only jointly but also severally. There is no question of representation in this case. Now there is no presumption that in every joint tenancy in this province there is also a several promise by which each joint tenant agrees to be bound for the whole rent. The case of *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (1) is authority for this proposition. The appellants rely on *Jogendra Nath Roy v. Nagendra Narain Nandi* (2), but it is not known whether in that case the facts showed that each tenant had contracted to pay the whole rent jointly and severally. On the other hand, *Ram Taran Chatterjee v. Asmatullah* (3) shows that even where one of several joint tenants without the authority of the others gives a kabuliyat for the whole rent, he is liable not for the whole but for his proportionate share of the rent if there are materials before the Court for determining that share. But it is contended that the compromise petition of 1915 constitutes a several promise by defendants 1 and 2 to be responsible for the whole

rent at the rate of Rs. 136-6-0. I do not think this contention can prevail. The petition is not before me, but from the judgment of the lower appellate Court it would seem that defendants 1 and 2 admitted that they held 22 bighas at Rs. 136-6-0. They nowhere contracted to pay the whole of this rental themselves. There can therefore be no decree against them alone for the whole rent. As there is no evidence of what their share is, the whole suit must be dismissed, the amount of rental being left open. The appeal succeeds and is decreed with costs throughout.

V.S./R.K.

*Appeal decreed.***A. I. R. 1916 Patna 77**

JWALA PRASAD, J.

Sri Ans Das—Plaintiff—Appellant.

v.

Jugat Pat Lall and others—Defendants—Respondents.

Second Appeal No. 2721 of 1915, Decided on 29th November 1916, from decision of Sub-Judge, Shahabad, D/- 30th July 1915.

Record of Rights—Batwara papers.

Butwara papers are admissible in evidence against parties to the butwara proceedings to rebut the presumption raised by the Record of Rights: 18 I C 143, *Dist.* [P 78 C 1]

Kulwant Sahai—for Appellant.*Naresh Chandra Saha*—for Respondents.

Judgment.—The appellant in this case is the reversioner to the estate of one Gokul Das who after the death of his widow came into possession of 8-annas share in Mouza Karji, now formed into a separate patti by virtue of a Collectorate partition. The respondent consists of two sets, viz. (1) The proprietors of 2-anna patti in the said village, being purchasers from the former owners of the said patti in 1306 or 1307 fasli; and (2) the tenants, who cultivate the land in suit. The appellant brought a suit to have his title declared over four plots, Nos. 234, 235, 238 and 239 of the Survey Record of Rights, and for recovery of possession over the said lands. The plaintiff-appellant alleged in the plaint that the said lands were the zerait lands of the proprietors and prayed for khas possession of the said lands as against the tenants-defendants in the case. The first Court gave the plaintiff a decree in respect of plots Nos. 234 and 239 but dismissed the suit in respect of the other plots. The Court

1. (1910) 7 I O 840.

2. (1907) 11 C W N 1026.

3. (1902) 6 C W N 111.

held that they were not zerait lands but were the kashit lands of the tenants-defendants, and hence the plaintiff was only entitled to receive rents from them and was not entitled to khas possession. The learned Subordinate Judge in appeal dismissed the entire suit of the plaintiff, holding that the plaintiff had failed to prove his title over these lands. The appellants had produced the butwara papers consisting of the butwara map, khasra and kara. These papers were admitted in evidence in the first Court but were rejected by the learned Subordinate Judge, on the sole ground that the partition took place under Act 8, of 1876 (Bengal Council) and not under the present Act of 1897, and hence these papers were not admissible in evidence to rebut the presumption raised by the Record of Rights.

Under the old Partition Act these papers were not evidence against the tenants as they were not parties to the proceedings. The case of the tenants has been set at rest by the findings of the first Court. The question before the lower appellate Court was between the plaintiff and the defendants who were cosharers in the estate before partition, as to the title to the lands in suit. In the proceedings held under the Butwara Act specific lands are allotted to the separate blocks assigned by the butwara to each cosharer. The title to the lands vests in the proprietor to whose share the lands are assigned by the butwara proceedings. After the completion of the butwara possession of the lands assigned to the proprietors is given by the Collector. The malik defendants were parties to the butwara. The butwara proceeding papers are therefore, good evidence of title as against them. I, therefore, hold that the Court below was entirely wrong in discarding these papers from its consideration. It is conceded by the learned vakil for the respondents that these papers are evidence against the defendants who are proprietors in the said estate. The ruling quoted, *Nanda Lal Pathak v. Chanurpat Das* (1), relied upon by the Court below, has no application to this case, as that was a case between the landlords and a Berhemter who was not a party to the partition proceedings, whereas here the suit is between landlords who were parties to the butwara. The suit was brought within 12 years from the

1. (1913) 18 I C 143.

death of the widow and no question of limitation arises, nor has it been raised by the respondents before me. The decision of the Subordinate Judge is entirely based upon a misconception regarding the admissibility of the partition papers. The order of the Subordinate Judge is, therefore, set aside and the case remanded to the Court below to decide the question of title of the plaintiff after accepting these papers in evidence and giving due consideration to them. The costs of this appeal will abide the result of the litigation.

V.S./R.K.

Case remanded.

A. I. R. 1916 Patna 78

ATKINSON, J.

Bhagloo Shah — Defendant—Appellant.

v.

Mahadeo Chaudhuri and others—Plaintiffs and Defendants—Respondents.

Appeal No. 2114 of 1915, Decided on 14th June 1916, from appellate decree of Dist. Judge, Mozufferpore, D/- 8th June 1915.

(a) **Landlord and Tenant—Ejectment suit—It must be of whole and not portion of holding.**

A suit for ejectment must be for the whole and not for a part of a holding. [F 79 C 1]

(b) **Ejectment—Suit—Who can—Plaintiff must have present right to possession—Reversioner cannot sue.**

An action for ejectment is based on the right to immediate possession, so that a plaintiff who has only a reversionary right in the holding cannot sue for ejectment: 11 C. W. N. 828 Diss.

[P 79 C 2]

(c) **Landlord and tenant—Ejectment—transferee—Acceptance of rent from transferee by agent amounts to acquiescence in transfer—Transferee cannot be ejected.**

Acceptance of rent from the transferee of a holding by the thicadars of the plaintiff amounts to a recognition of and acquiescence in the transfer and is a bar to a suit for ejectment. [P 79 C 2]

Lachminarayan Singh, Baidyanath Singh and Gursaran Pershad—for Appellant.

Atul Krishna Rai—for Respondents.

Judgment.—This is an action for ejectment from a certain plot of land containing 2 kathas 2½ dhurs, within the Municipality of Muzafferpore, and which defendant 1 purchased from defendant 2 on 3rd July 1907. The ground on which the ejectment is based is that the holding was a non-transferable holding and that there was no custom prevailing on the estate recognising transferability. I give just a few facts in connection with the history

of the case. The lands sought to be recovered in this ejectment form part of a larger holding, which contained 4 kathas 11 dhurs, and was let originally by the plaintiffs to Khedi Pasban. He, it appears, disposed of the entire 4 kathas 11 dhurs to defendant 2, who subsequently sold 2 kathas 8½ dhurs to others purchasers and the balance, namely, 2 kathas 2½ dhurs, he retained and the same was long afterwards transferred to defendant 1, by defendant 2, on 3rd July 1907, and the plaintiffs seek to recover only that part of the original holding which is now in defendant 1's possession. The original tenancy now appears to have been altered or varied in many of its terms after the holding was split up. The plaintiffs have let the lands to the defendants of the third party under a lease dated 2nd December 1906, and by that lease nothing is reserved to the plaintiffs over and above the payment of rent, save certain timber rights, and the lessees are entitled to all the tenanted lands and to the rent accruing therefrom. The lease is for a term of 11 years from 2nd December 1906, and is still current, and consequently it appears that plaintiffs are only entitled to a reversionary interest in the lands sought to be recovered on the expiration of the said lease. In para. 8 of defendant 1's written statement, it appears that since he purchased the property in July 1907 he has paid rent to the thicadars as the representatives of the plaintiffs, and that such rent has been accepted, notwithstanding that the holding is alleged to be non-transferable.

The Municipality of Muzafferpore have extended their boundary so as to include this small plot of land purchased by defendant 1. It is contended, in the first place, that the Bengal Tenancy Act has no application to the present case, inasmuch as this is land situated in a Municipality. But in my opinion, that contention is not well founded. One has to look at what was the condition of things prevailing at the time of the original letting, and clearly the land was originally let for the purpose of cultivation. In my opinion the plaintiffs are not entitled to succeed in this action for three reasons. First of all they seek only to recover a part of the holding as originally created, and it is well established that in a suit for ejectment one must eject as to all and not as to a part. Secondly, the plain-

tiffs must fail because they are not now entitled to possession of the property they seek to recover. An action for ejectment is based on the right to immediate possession. This suit was brought on 29th July 1913, and the lease referred to in favour of the defendants of the third party is still outstanding. Therefore, in my opinion, the plaintiffs, only having a reversionary interest in this small plot of land as part of a larger holding, are not now entitled to recover possession, and the case referred to as *Raj Kishore Awasthi v. Jadu Nath Bysak* (1) and the observation of the Chief Justice therein does not appear to me to be a correct statement of law. Thirdly, I think the plaintiffs are not entitled to succeed because they have let the land to thicadars as middlemen landlords. The defendants of the third party have been in receipt of and have accepted and rent from defendant 1 since the date of the transfer to him. And thus it must be held that the thicadars have recognised by their conduct and acquiesced in the transfer made to defendant 1 by defendant 2, and the plaintiffs, having put the thicadars in the position in which they have done, are in my opinion, bound by their actions and conduct. Consequently for these reasons in my opinion the action must fail. I reverse the order on appeal and dismiss the action with costs in all Courts.

V.S./R.K.

Appeal allowed.

1. (1907) 11 C W N 828.

A. I. R. 1916 Patna 79

MULLICK, J.

Ram Lochan Koer—Appellant.

v.

Jagernath Misser—Respondent.

Second Appeal No. 2777 of 1914, Decided on 5th May 1916, from decision of Dist. Judge, Darbhanga, D/- 18th June 1914.

(a) **Bengal Estates Partition Act (1876)—Partition of holding without tenant's consent is not prevented by Act.**

There is nothing in the Estates Partition Act of 1876 to prevent the partition of a tenancy into separate tenancies without the consent of the tenants and on general principle there is no reason why such a partition should not be made. [P 80 C 1]

There is in this respect no difference between a partition under the Estates Partition Act and a partition made by a civil Court : 10 C. W. N. 818, *Rel. on.* [P 80 C 1]

(b) **Bengal Estates Partition Act (1876)—Sale of separated plot constitutes abandonment entitling landlord to re-enter.**

Where a holding has been split up, a sale by the tenant of an entire plot that has been separated constitutes abandonment which entitles the landlord to re-enter. [P 80 C 2]

Lachmi Narayan Sinha—for Appellant.

Tribhuban Nath Sahay—for Respondent.

Judgment.—The second party defendants were the joint holders of a holding measuring 2 bighas odd situated within the estate of the plaintiff and his co-sharers, the defendants third party. By civil Court partition the estate was broken up. There was a further partition by private arrangement with the result that the holding was divided into two portions one of which, measuring 17 cottas and 8 dhurs, fell into the patti of the plaintiff. The second party defendants subsequently sold this plot of 17 cottas and 8 dhurs to the defendant first party. The plaintiff thereupon sued the defendant first party (the purchaser) for ejectment on the ground that there had been a complete abandonment of the entire holding by the registered tenant. There was a plea that the registered tenant had re-purchased the land and re-entered into possession, but that case has been disbelieved, and the only point taken before me now in this second appeal preferred by the defendant second party is, that as there has been an abandonment of only a portion of the holding, the landlord cannot re-enter. It is contended that the partition among the landlords cannot affect the registered tenants without their consent and, that although in respect of a partition under the Estates Partition Act a tenancy may be split up into various separate tenancies without the consent of the tenant, yet such a result does not follow upon a civil Court partition without the consent of the tenant. In *Protab Chandra Das v. Kamala Kanta Shaha* (1) it was held that there was nothing in the Estates Partition Act of 1876 to prevent the partition of a tenancy into separate tenancies and on general principles the Court did not see any reason why such a partition could not be made. I see no difference in the matter of the partition of a tenancy between a partition under

the Estates Partition Act and a partition made by a civil Court.

So far as the landlord and tenant are concerned their position in the matter is the same in both partitions. If, therefore, the civil Court assigned to the plaintiff a holding of 17 cottas and 8 dhurs at a certain rental as being his exclusive property the defendant second party would, in my opinion, be bound by that apportionment. But in this case there is a further reason why the partition should be upheld. It has been found by the learned Munsif, and affirmed by the learned District Judge by implication, that the second party defendants have accepted the splitting up of the whole tenancy by payment of rent according to the civil Court's apportionment. That being so the consent of the tenant is established. It is not open to the tenant in second appeal to say that he did not consent to the partition of the holding. Therefore, the learned District Judge is right in finding that an entire holding was sold by the second party defendants and that such sale constitutes abandonment. The decree for ejectment, therefore, of the transferee first party defendant is correct. The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 80

JWALA PRASAD, J.

Bachhu Ram—Petitioner.

v.

Chunder Tawaif—Opposite Party.

Civil Revn. No. 79 of 1916, Decided on 7th December 1916, against order of Munsif, First Court, Muzaffarpur, D/-10th April 1916.

Contract Act (1872), Ss. 2 (d) and 40—Contract for personal service—Performance by third person—There is failure of consideration.

Defendant agreed to pay Rs. 5 per mensem to plaintiff for life in consideration of the latter having the former trained in the art of singing and dancing at his own cost. It was found that plaintiff's sister, and not plaintiff himself, had rendered those services for defendant:

Held: that the contract was one for personal service said to be rendered by plaintiff and as plaintiff himself had done nothing for defendant, there was no consideration for the contract and defendant could not be held liable to pay anything under the agreement to plaintiff.

[P 81 C 1]

Muhammad Mustafa Khan—for Petitioner.

Rajendra Pershad—for Opposite Party.

Judgment.—The plaintiff is the applicant in this case. He brought the suit in the Court of Small Causes at Muzafferpur for recovery of certain sums based upon a registered agreement executed in his favour on 29th April 1911 by the defendant. By the agreement, the defendant agreed to pay Rs. 5 per mensem to the plaintiff for life, and the consideration for this agreement, as set forth in the document, is that the plaintiff got the executant trained in the art of singing and dancing at his own cost. The lower Court has held as a matter of fact that the plaintiff took no part in the teaching or the sheltering of the defendant and that the promise to pay him Rs. 5 per mensem for life is entirely gratuitous, and is therefore void. As the consideration of the agreement has failed according to the finding of the Court, the plaintiff has no cause of action and the suit has been rightly dismissed. No law or authority has been quoted on behalf of the applicant to show that the view taken by the Court below is wrong. It is contended by the learned vakil for the appellant that, as the Court below has found that the sister of the plaintiff sheltered the defendant, brought her up, and engaged a teacher for her, the lower Court should have held that there was a valid consideration in the bond and should have decreed the plaintiff's suit. I do not see any substance in the contention. The contract was in consideration of a personal service said to have been rendered by the plaintiff. Whatever may have been her gratitude towards the sister of the plaintiff, the plaintiff himself did nothing for the defendant. There is no consideration for the contract and the defendant is not at all bound to pay anything to the plaintiff. I decline to interfere with the view taken by the lower Court. The application is dismissed with costs.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 81

ROE AND JWALA PRASAD, JJ.

Manik Ram Ahir and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 17, 138, 141, 142 and 143 of 1916, Decided on 2nd June 1916, against order of Sess. Judge, Sambalpur, D/- 5th April 1916.

1916 P/11 & 12

Assam Labour and Emigration Act (6 of 1901)—Emigration in Act must be emigration with idea that emigrant must intend to arrive in labour district and labour therein.

Emigration to be emigration within the meaning of the Assam Labour and Emigration Act must be emigration with the idea that the object to be attained or kept in view by the emigrant is arrival in a labour district and labouring there. [P 81 C 1]

The accused induced coolies to leave Sambalpur under a promise that they would be employed as domestic servants in Chittagong, but they were in fact taken to Assam to work in the labour districts. The accused were convicted under S. 164, Emigration Act:

Held: that the conviction was bad, inasmuch as the coolies did not depart from Sambalpur with the object of proceedings to a labour district and labouring there. [P 82 C 1]

M. Yunus and Sisir Kumar Mitter—for Petitioners.

S. Ahmad—for the Crown.

Judgment.—In these cases the accused Manik Ram and others employed by him have been convicted under S. 164, Emigration Act. The facts found are that they induced coolies to leave Sambalpur under a promise that they would be employed as domestic servants in Chittagong, but they were in fact taken to Assam to work in the labour districts. In one case a coolie was stopped at Goalundo; in others they were found in the labour districts and sent back to their country. It is urged that the cases do not fall under the section for the reason that the word "emigration" is defined as a departure for the purpose of labour in the labouring districts. The learned Deputy Government Advocate admits that these words used in their strict sense contemplate an idea in the mind of the emigrant that he is going to a labour district. He suggests that where S. 164 is in question the fact that the word "induces" precedes the word "emigrate" shifts the purpose from the mind of the coolie to the mind of the recruiter. This contention we cannot accept. "Purpose" means "the object to be attained or to be kept in view," and emigration to be emigration within the meaning of the Act must be emigration with the idea that "the object to be attained or kept in view" by the emigrant is arrival in a labour district and labouring there. We are of opinion therefore that these convictions cannot be maintained and must be set aside. We note that in the judgment of the learned District Judge he sets down clearly that he finds as a fact that the offence committed was that of cheating. Without

prejudging in any way this issue, we feel that having come to that decision it was the duty of the learned Judge to remit the case to the Subordinate Court after framing charges under S. 417. We direct that this course be now taken. The accused will be re-tried by a Court of competent jurisdiction, that is, a Court having jurisdiction over the places where fraudulent deception was practised upon these emigrants, inducing them to do something which they would not have done and which act was likely to cause damage or harm to his body, mind, reputation or property. One of such acts would no doubt be the journey of the coolies from the depot to the train and the entering into the railway carriage. But we leave it to the District Judge to decide what charges shall be framed and in what part of the district the trial shall be held. As Mr. Lucas and Mr. Misra have already apparently made up their minds on the whole case, the District Magistrate will no doubt be able to find some other Magistrate competent to try the case. The section under which we have ordered a re-trial being bailable, we direct that the accused remain on bail to the satisfaction of the District Magistrate pending the trial, such bail not to exceed Rs. 500 in each case.

V.S./R.K.

*Retrial ordered.***A. I. R. 1916 Patna 82**

MULLICK AND KINGSFORD, JJ.

Mt. Janakbati Thakurain—Defendant—Appellant.

v.

Gajanand Thakur—Plaintiff—Respondent.

Appeal No. 478 of 1913, Decided on 23rd May 1916, from original decree of Dist. Judge, Purnea, D/- 19th August 1913.

(a) Probate and Administration Act (1881), S. 83—Probate proceedings—Compromise in—Effect of stated.

The main issue in a probate case is whether or not the will has been proved, and the only effect of a compromise in such a case is to reduce a contentious proceeding into one which is not contentious and a Court is not absolved from the task of either granting probate or refusing it. [P 83 C 1]

(b) Probate and Administration Act (1881), S. 83—Probate proceedings—Compromise in—Objector withdrawing—Probate will be granted in common form.

If a compromise has been made in a probate case and the objector withdraws from the contest, a Court will grant probate in common form,

but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him. [P S C 1]

(c) Probate and Administration Act (1881), S. 83—Objector agreeing to compromise can subsequently resile from it.

Where during a probate proceeding an objector has agreed to a compromise it is open to him to subsequently resile from it and insist upon the trial of the issue whether the will was duly executed. [P 83 C 2]

(d) Probate and Administration Act (1881), S. 83—Without proving will testator's property cannot be divided—Civil P. C. (1908), O. 23, R. 3.

Order 23, R. 3, Civil P. C., read with S. 83, Probate and Administration Act, do not say that it is competent to the Courts to allow the parties to divide the testator's property without proving the will. [P 83 C 1]

Laksmi Narain Sinha—for Appellant.

Abani Bhushan Mukerjee—for Respondent.

Mullick, J.—Rudra Nand, Kula Nand and Tirtha Nand were three brothers of a Mitakshara family living joint in food and worship. It is alleged that Kula Nand separated from the joint family about 20 years before the will, which is the subject of the case before us. Rudra Nand died on 11th June 1911, leaving a will alleged to have been executed on 9th June 1911. Probate of the will was applied for by Gira Nand, and Gaja Nand, sons of Tirtha Nand, on 6th December 1911. On 18th May 1912, Janakbati, the widow of Rudra Nand, filed an objection attacking the will as forgery. On 18th August 1912 a petition alleged to have been signed by Janakbati was filed before the Court, stating that she and the propounders had agreed to divide the testator's property and praying that the application for probate might be dismissed on compromise without decision. It appears that on the same day another petition purporting to have been signed by Janakbati was filed before the Court, stating that the petition of compromise had not in fact been signed by her. On 25th May 1912 the learned District Judge framed the following issues for determination:

1. Is the will propounded by the plaintiffs genuine? 2. Was the testator Rudra Nand Thakur in a sound disposing state of mind when he is alleged to have executed the said will? 3. Are the plaintiffs entitled to probate as prayed? But on 19th May 1913 he disregarded the issues framed on 25th of May 1912 and address-

ed himself only to the two following issues: 1. Can this case be disposed of in terms of the petition of compromise? 2. Did, Mt. Janakbati sign the petition of compromise with full knowledge of its contents after it was written? The learned District Judge took evidence upon the two issues abovementioned and found that inasmuch as the objectrix had with full knowledge signed the petition of compromise, she was no longer competent to resile from the same. He accordingly ordered the case to be dismissed in terms of the petition of compromise. The learned District Judge's decree is to the same effect and after reciting that the case is dismissed in accordance with the petition of compromise, it proceeds to embody in it the full terms of that compromise. The present appeal before us is preferred by the objectrix, who asks that the case should be remanded in order that the execution of the will may be proved in solemn form. It is quite clear, and the learned vakil for the respondent admits, that the learned District Judge's order, as it stands, cannot be supported. In a probate case a decree such as that by him is meaningless. There can be no dismissal of a probate case in accordance with the terms of a petition of compromise.

The main issue in such a case is, whether or not the will has been proved, and as has been pointed out in several decisions in the Courts, the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious but this does not absolve the Court from the task of either granting probate or refusing it. If a compromise has been made and the objector withdraws from the contest the Court will grant Probate in common form, but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him. The learned vakil for the respondent relies upon O. 23, R. 3, Civil P. C., read with S. 83, Probate and Administration Act. But these sections merely mean that in a probate case the Civil Procedure Code so far as possible determines the procedure of the Court. These sections nowhere say that it is competent to the Court to allow the parties to divide the testator's property without proving the will. The cases of *Kunja Lal Chowdury v. Kailash Chan-*

dra Chowdhury (1) and *Sarada Kanta Das v. Gobinda Mohan Das* (2) carry the case of the respondent no further. In the first of these two cases it was, no doubt, laid down that when probate has been given in common form upon the filing of a petition of compromise by the objector it will no longer be open to the same objector to reopen the proceedings by way of revocation. But the learned vakil for the respondent has been unable to show any case which goes so far as to say that before probate is given by the Court it is not open to the objector to insist upon the proof of the will. The view of the learned lower Court appears to have been that as on 28th August 1912 the objectrix had agreed to a compromise, it was no longer open to her to resile from it except upon proof of fraud.

In my opinion that is an erroneous proposition of law. It must always be a question of fact whether the proceedings are contentious or not. It may be that on 28th August 1912 the objectrix had consented to withdraw her objection, but it is quite clear that on 19th August 1913 she had withdrawn that petition and that she was insisting upon the trial of the issue whether the will had been duly executed. She was not estopped from withdrawing her objection and from asking that the will should be proved in solemn form. This being so, the order and decree of the lower Court must be set aside and the case remanded for disposal according to law. The objectrix will have a chance of contesting the genuineness of the will and if she fails, probate must be given in solemn form. If she withdraws her objection probate must be given in common form, but the Court must do either one or the other of these two things. If she succeeds the application of the propounders will be dismissed. As regards the compromise alleged to have been made by the objectrix, the Court has no greater power to enforce it than any other contract made out of Court. The appeal is decreed with costs, which will be according to scale.

Kingsford, J.—I agree.

V.S./R.K

Appeal decreed.

1. (1910) 7 I C 740.

2. (1910) 6 I C 912.

A. I. R. 1916 Patna 84 (1)

JWALA PRASAD, J.

Rameshwar Singh—Plaintiff—Appellant.

v.

Halli Jha—Defendant—Respondent.

Second Appeals Nos. 2078 and 2079 of 1914, Decided on 28th November 1916, against decree of Dist. Judge, Darbhanga, D/- 20th April 1914.

Civil P. C. (1908), O. 8, R. 6—Suit for rent—Jeth raiyat can set off his commission.

In a suit for rent by a landlord against his jeth raiyat, the latter is entitled to set off the ascertained commission due to him from the landlord on the amount of rents collected by him from the tenants of the village on behalf of the former. [P 84 C 2]

Murari Prasad—for Appellant.

Judgment.—The appellant in both these appeals is the landlord of the village and the defendants are the jeth raiyats or head tenants in that village. The appellant brought two suits—one against each of the respondents—for recovery of arrears of rent for the years 1316 to 12 annas kist of 1319 in respect of the kasht lands held by the respondents in the village of Belahi belonging to the appellant. The defendants contended that they were entitled to have their commission, due from the plaintiff-appellant on account of collection on rents from the tenants of the village made by them for the plaintiff, set off against the rents claimed by the appellant. Both the Courts below allowed the contention of the defendants, and the commission due to them was set off against the claim of the plaintiff-appellant for rent against them. The plaintiff has therefore come in appeal to this Court.

It is contended on behalf of the plaintiff-appellant that the Court below was wrong in allowing the set-off. The grounds for the contention are (1) That the commission due to the defendants is not an ascertained sum under O. 8, R. 6, Civil P. C.; and (2) that no set off could be allowed in this case as the parties do not fill the same character of landlord and tenant in both the claims. As to the first contention, it was accepted by the lower Courts that the commission was a certain percentage, namely 3 per cent. on the collection made by the defendant. The *siaha* for the years 1318 was filed by the appellant which showed the exact amount of the collections made by the defendants for the plaintiff. The amount shown in

the *siaha* is an ascertained amount and amount due to the defendant as commission is a pure matter of calculation, that is 3 per cent. of the amount of the collections. The lower Court is therefore right in holding that the amount of commission is an ascertained sum under O. 8, R. 6, Civil P. C. As to the second point, the collection was made by the defendants for the plaintiff as jeth raiyats or head tenants of the village, that is, in the capacity of tenant of the plaintiff landlord.

The suit for rent was by the plaintiff as a landlord against the defendants as tenants. The parties therefore fill the same capacity in both the claims. The cross-demands are so connected in their nature and circumstances as to make it inequitable that the defendants should be driven to another suit. I think the defendants are entitled to set off their claim in law and in equity. The defendants have paid court-fee on the amount claimed by them as set-off. The result is that I agree with the findings of the lower Court. The appeals are dismissed with costs.

V.S./R.K.

*Appeals dismissed.***A. I. R. 1916 Patna 84 (2)**

CHAMIER, C. J. AND JWALA PRASAD, J.

Dhanukdhari Mahton—Defendant—Appellant.

v.

Serajul Huda—Plaintiff—Respondent.

Second Appeal No. 338 of 1915, Decided on 24th July 1916, from decision of Dist. Judge, Patna, D/- 29th January 1915.

(a) Bengal Road Cess Act (1880), S. 20—Landlord and tenant—Suit for rent at rate higher than that mentioned in Road Cess Return does not lie.

A landlord is not entitled to claim rent at a rate higher than that shown in the Road Cess Return, unless there has been a material alteration of the holding. A mere alteration in the area due either to measurement or to encroachment will not take the case out of the operation of S. 20, Cess Act; 19 I C 249, *Ref.*

[P 86 C 1]

(b) Bengal Road Cess Act (1880), S. 20—Record of Rights and jama wasilbaki—Entry in does not override S. 20.

An entry in the Record of Rights which only raises a presumption, or the jama wasilbaki showing the rent for a particular year, cannot override the statutory prohibition contained in S. 20, Cess Act. [P 86 C 1]

Kulwant Sahay—for Appellant.*Pugh, Purnendu Narayan Sinha and Muhammad Ishaq*—for Respondent.

Jwala Prasad, J.—The respondent is the proprietor of the entire sixteen-annas of Mauza Barea Kalan, Pargana Azimabad, District Patna. The appellant is a tenant in the mauza. The respondent brought a suit in the Court of the Munsif, 4th Court, Bankipore, for recovery of arrears of rent for the years 1318—20 and the first half of 1321 Fasli. He alleged that the appellant holds 35 bighas 15 kathas 16 dhurs of land at an annual rental at Rs. 309-3-3. The appellant pleaded that the holding consisted of an ancestral kasht of 33 bighas 13 kathas, which by measurement at the recent cadastral survey came to 35 bighas odd, that the annual jama was only Rs. 219-4-0, which he and his ancestors had all along been paying to the landlord, and that the respondent had no right to recover a higher rent than Rs. 219-4-0 a year, the amount shown in the Road Cess Return filed on behalf of the plaintiff in 1894. In reply to this the plaintiff-respondent endeavoured to show at the trial that subsequent to the lodging of the return the defendant-appellant had taken a settlement of some khudkasht land, and had exchanged some of his inferior land for superior land and that the jama of Rs. 309 odd claimed by the plaintiff had been fixed by readjustment. It was contended that S. 20 did not bar the recovery of the rent claimed by the plaintiff, inasmuch as the land was altogether different from that held by the defendant when the Road Cess Return was filed,

The respondent examined a number of witnesses headed by his servant Fariduddin to prove the alleged new settlement and exchange. The oral evidence was so conflicting and worthless that it was wholly abandoned by the plaintiff's vakil in the first Court. The plaintiff's case, therefore, rested entirely upon the survey khatian and the jama wasilbaki of 1317 Fasli. The first Court held that the plaintiff had failed to prove the case of fresh settlement and exchange set up by him at the trial, that the jama wasilbaki was not a genuine document, and that the khatian was not correct. The learned Munsif accepted the Road Cess Return as binding upon the plaintiff and as proving that the jama of the defendant was Rs. 219-4-0 with cesses, and gave a modified decree on the basis of this jama. The plaintiff-respondent appealed to the Dis-

trict Judge, who reversed the decision of the Munsif and decreed the suit at the rate of Rs. 309-3-3 per annum as claimed by the plaintiff. The defendant appealed to this Court. He contends that the learned District Judge was wrong in giving a decree at a rate of rent higher than that shown in the Road Cess Return. In my opinion the contention is sound. S. 20, Road Cess Act 9 of 1880 runs as follows:

"Every holder of an estate or tenure in respect of which return has been made shall be precluded from suing for or recovering (a) any rent whatsoever for any land, holding or tenure which has not been mentioned in such return, unless it be proved that the holding or tenure for the rent of which the rent is claimed was created subsequently to the lodging of such return; (b) rent at any higher rate than is mentioned in such return for any land, holding or tenure, included in such return unless it be proved that the rent of such land or tenure has been lawfully enhanced subsequently to the lodging of such return."

The reason given by the learned District Judge for not acting on the Road Cess Return may be given in his own words:

"I am satisfied that there has been a material change in his holding since 1894 and that this Road Cess Return is not sufficient to rebut the presumption arising from the finally published Record of Rights. Moreover, I see no reason whatever to doubt the genuine character of the jama wasilbaki for 1317, which bears the thumb impression of the defendant and shows that the defendant's rent in that year was admitted to be the rent now claimed."

The learned District Judge has given no sufficient reason for holding that there has been a material change in the holding, nor has he attempted to show how the change would cause an increase of the rent from Rs. 219-4-0 entered in the Road Cess Return to that of Rs. 309-3-3 claimed by the plaintiff. He does not find either that the holding for which rent is claimed was created subsequent to the lodging of the return or that the rent of the holding was lawfully enhanced. He does not question the finding of the learned Munsif that the plaintiff failed to prove the new settlement and exchange set up by him, nor does he differ from the first Court regarding the value of the oral evidence. He finds that a material change has taken place in the holding merely because the defendant's holding as given in the Road Cess Return would amount to less than 30 bighas according to a standard of 20 kathas to the bigha, whereas the survey measurement

has found the land in the defendant's possession to be 35 bighas odd. The question is whether the holding is the same. The mere alteration in area due either to measurement or to encroachment will not take the case out of S. 20 Road Cess Act.

Mr. Pugh as a last resort urged that the case should be remanded to the lower appellate Court for a finding on the question whether the increase in the defendant's area from 30 bighas to 35 bighas is due to a fresh settlement or exchange. I do not think that any useful purpose would be served by remanding the case at this stage. The plaintiff did not in the plaint make out a case of new settlement or exchange. His attempt to prove this case at the trial failed and the plaintiff's vakil in the first Court abandoned the oral evidence. Two of the plaintiff's witnesses even admitted that the defendant holds the lands in dispute from the time of his ancestors. It is thus clear that the holding is the same and that the plaintiff is not entitled to a rent higher than that shown in the Road Cess Return: *Rameshwar Singh v. Mohendra Narain Koer* (1). Neither the entry in the Record of Rights, which only raises a presumption, nor the jama wasilaki, which only shows the defendant's rent in the year 1317 can override the statutory prohibition contained in S. 20, Road Cess Act. In my opinion, the decree of the lower appellate Court should be set aside with costs here and in the lower appellate Court and that of the first Court restored and I would order accordingly.

Chamier, C. J.—I agree with the order proposed.

V.S./R.K.

Appeal allowed.

1. (1913) 19 I C 249.

A. I. R. 1916 Patna 86 (1)

ROE AND JWALA PRASAD, JJ.

Rahmatulla and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 96 of 1916, Decided on 19th May 1916.

Penal Code (1860), Ss. 71 and 353—One act constituting two offences—Separate punishment cannot be inflicted if offences are under different laws—**Railways Act (1897), S. 26.**

When one act constitutes two offences, separate punishment for each offence can only be inflicted, if both offences are against the same law.

[P 86 C 2]

M. Yunus—for Applicant.

Sultan Ahmad—for the Crown.

Judgment.—This rule must be made absolute. S. 71 itself indicates that when one act constitutes two offences, those offences must, if it is desired to inflict separate punishment for each offence, be offences against the same law. S. 26 of General Clauses Act makes the point still more clear. In this case the accused by one act resisted the Police and endangered the lives of bystanders. One offence is under the Penal Code, and the other under the Railways Act. The conviction and sentence under the Railways Act must be set aside. The conviction under S. 353 of the Penal Code will stand.

V.S./R.K.

Order modified.

A. I. R. 1916 Patna 86 (2)

ROE, J.

Ambica Prasad and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 14 and 15 of 1916, Decided on 4th September 1916, against an order of Sessions Judge, Saran, D/- 26th June 1916.

Criminal P. C. (5 of 1898), Ss. 195 and 476—District Judge has power to convert proceedings to obtain or to revoke sanction refused or granted in lower Court under S. 195.

A District Judge has power to convert proceedings to obtain or to revoke sanction, refused or granted in a lower Court under S. 195, Criminal P. C., into proceedings under S. 476: 34 All 602, Ref; 13 I C 111, Rel. on.

[P 87 C 1]

S. Sinha, Harnarayan Prasad and Nirsu Narayan Sinha—for Petitioners.

Sultan Ahmad—for the Crown.

K. P. Jayaswal—for Opposite Party.

Judgment.—In these two cases a somewhat important point arises as to the power of the District Judge to convert proceedings to obtain or to revoke sanction, refused or granted in a lower Court under S. 195, into proceedings under S. 476. There seems to have been in the earlier rulings of the Allahabad High Court an impression that proceedings under S. 195 were not judicial proceedings, and that the District Judge would be acting without jurisdiction in taking action in such proceedings under S. 476. But these doubts seem to me to have been completely set at rest in the

case of *Chadammi v. Lalta Prasad* (1) and still more so by the very full discussion of the question by Mukerjee and Carnduff, JJ., in *Bala Pasban Kuldip Lal v. Gurwar Misser* (2). I entirely agree with the reasoning set out in the latter case, and I am satisfied that when a case of perjury or forgery is brought to the notice of the District Court under S. 195, that Court has the power to convert the proceedings and take action under S. 476. The applications are accordingly rejected.

V.S./R.K. *Applications rejected.*

1. (1912) 31 All 602=16 I C 525.
2. (1912) 13 I C 111.

A. I. R. 1916 Patna 87

CHAMIER, C. J. AND ROE, J.

Khalil Ahmad and others—Plaintiffs—Appellants.

v.

Israfil and others—Defendants—Respondents.

Second Appeals Nos. 1970 and 2030 of 1915, Decided on 21st December 1916, against decree of Dist. Judge, Monghyr.

(a) Mahomedan Law—Applicability—Ahmadis.

Members of the Ahmadiya sect of Qadian are Mahomedans [P 87 C 2]

(b) Mahomedan Law—Applicability—Mosque—Members of any and every sect cannot pray in every mosque as separate congregation.

Every mosque is open to any Mahomedan, to whatever sect he may belong, who chooses to pray in it. But members of any and every sect of Mahomedan are not entitled to pray in every mosque as a separate congregation behind an imam chosen by themselves. [P 88 C 1]

Per *Roe, J.*—*Semle.*—Where people deliberately come late to prayers they cannot be allowed to have a second service of their own. [P 88 C 2]

Zafrulla Khan and Khurshed Hasnain—for Appellants.

Mazharul Haq, Muhammad Yunus, Fakhruddin Mustafa Khan, Muhammad Tahir and Nurul Hasan—for Respondents.

Chamier, C. J.—These are cross-appeals against a decree of the District Judge of Monghyr, modifying a decree of the Subordinate Judge of Monghyr which dismissed the plaintiff's suit. The plaintiffs are professed followers of Mirza Ghulam Ahmed of Qadian in the Punjab who acquired considerable notoriety as a preacher about 35 years ago and attracted a considerable following in the Punjab, and elsewhere. The followers of

Ghulam Ahmed are known generally as Ahmadis or qadianis. The plaintiffs' case was that, though dissenters from what is generally regarded as the orthodox Mahomedan faith, they are true Mahomedans. They say that till December 1911 they were in the habit of offering up their prayers both individually and as a congregation in a certain mosque in Mohalla Dilawarpur in the town of Monghyr, but were then prevented by the defendants from doing so. They claimed a declaration of their right to offer prayers in the mosque both individually and as a congregation and also an injunction restraining the defendants from interfering with them. The defendants resisted the suit on various grounds and inter alia pleaded that the plaintiffs were not Mahomedans at all. The Subordinate Judge held that the plaintiffs were Mahomedans, but were not entitled to form a separate congregation for prayer in the mosque. He held that they were entitled to offer prayer individually behind the Hanafi imam of the mosque but as they did not desire to do that, he dismissed the suit. On appeal the District Judge agreed that the plaintiffs must be regarded as Mahomedans and that they could not be allowed to form a separate congregation for prayers in the mosque, but gave them a declaration that they were entitled to worship in the mosque behind the recognised imam and in the same congregation as the defendants.

In these second appeals the plaintiffs contend that their claim should have been decreed as laid and the defendants contend that the suit should be dismissed altogether. Some attempt was made on behalf of the defendants to controvert the concurrent findings of the Courts below that the plaintiffs were Mahomedans, but it was not seriously pressed. The Courts below have given convincing reasons for holding that the plaintiffs are Mahomedans, notwithstanding their pronounced dissent from orthodox opinion on several important articles of the faith. The plaintiffs as Mahomedans appear to be entitled to enter the mosque if they please and to offer up prayers with the regular congregation behind the recognised imam, but as they profess to regard orthodox Mahomedans as infidels it is unlikely that they will take advantage of the decree made by the District Judge.

The important question in the case is whether the plaintiffs are entitled to pray as a separate congregation in the mosque, i. e., behind an imam of their own.

The claim is an extravagant one and there can be little doubt that if it is allowed, there will be serious trouble in the mosque. The plaintiffs contend that every mosque is dedicated to the worship of God and is open to any Mahomedan, to whatever sect he may belong, who chooses to pray in it. The cases reported as *Empress v. Ramzan* (1), *Ata-ullah v. Azim-ullah* (2) and *Jangu v. Ahmad Ullak* (3) and other authorities on which the plaintiffs rely certainly support this contention, but they lend no support to the further contention advanced by the plaintiffs, namely, that the members of any and every sect are entitled to pray in every mosque as a separate congregation behind an imam chosen by themselves. The mosque in question has been in existence for about 200 years and appears to have been used all along by orthodox Sunni Mahomedans. In all probability it was established for the benefit of Sunni Mahomedans though it may be that other Mahomedans are entitled to pray in it individually or join in the congregational worship which is conducted there. No authority whatever has been cited for the proposition that half a dozen members of a new sect (it is said that there are only so many Ahmadis in Monghyr) are entitled to thrust themselves into a mosque which has been used by orthodox Sunni Mahomedans for generations, form a separate congregation there, and disturb the old standing arrangements for the conduct of worship in the mosque. It is suggested that certain times might be allotted to the plaintiffs for congregational worship with their own imam. Such an arrangement appears to be unknown to the Mahomedan law.

It would curtail the time available for the orthodox Sunnis who have used the mosque for so many years. As already stated, the plaintiffs regard orthodox Sunnis as infidels. The orthodox Sunnis in their turn regard the Ahmadis as infidels and have, we are told, formally denounced them as such. There would

almost inevitably be serious trouble in the mosque. It appears to me that what the plaintiffs wish to do is as likely to cause acute friction (if nothing worse) as if they actually disturbed the orthodox at their prayers in the mosque. As there is no authority for the contention advanced by the plaintiffs and it is clear that the rights enjoyed by the orthodox for generations would be seriously impaired by the intrusion of the plaintiffs as a separate congregation and it is certain that the admission of their claim would result in unseemly conflicts in the mosque, I am of opinion that their claim should be rejected. I would dismiss both appeals with costs.

Roe, J.—I agree that this appeal should be dismissed. The sole object of the case is to secure a decree that the appellants are entitled to deliberately abstain from joining in the ordinary worship of the mosque and to appoint an imam of their own to read prayers for them after the ordinary worship has been concluded. The learned Subordinate Judge who tried this case is himself a Mahomedan gentleman and he quotes it in his judgment as a well known rule of worship that where people deliberately come late to prayers they will not be allowed to have a second service of their own. This seems to me to be in accordance with an extract from B-7 and B-13 of Vol. 1 of the chapter relating to azan of Zadul Maad which runs:

"Even if he waits for the imam of his own sect, having removed himself from the midst of men of a different sect, while offering up prayers with congregation, this act of his will not be considered as his turning away from the congregation with abhorrence when it is known that he is waiting for a congregation which is most perfect."

This seems to imply that if he does turn away from the regular prayers with abhorrence he cannot be allowed to have a special imam of his own. In the case before us the plaintiffs state clearly that they will not, under any circumstances, worship behind an imam who does not recognise Mirza Ghulam Ahmad. Having made that statement of fact, it seems to me clear that they are not permitted to have subsequent services and worship under an imam of their own. I agree therefore that the appeals should be dismissed with costs.

V.S./R.K.

Appeals dismissed.

1. (1885) 7 All 461.
2. (1890) 12 All 494.
3. (1891) 13 All 419.

A. I. R. 1916 Patna 89 (1)

CHAMIER, C. J. AND ROE, J.

Soman Koeri and others—Defendants—Appellants.

v.

Ram Kinker Das and another—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2776 of 1915, Decided on 6th December 1916, from a decision of Dist. Judge, Darbhanga, D/- 12th August 1915.

Hindu Law—Joint family—One member cannot by executing deed, transfer his undivided share in family property or give that person right to apply for partition.

One member of a joint family cannot, by executing a deed, transfer to another person his undivided share in the family property or give that person the right to apply for partition. It is otherwise where in execution of a decree the undivided interest of a member of a joint Hindu family has been put up for sale. In that case the purchaser is entitled to sue for partition of the interest purchased by him. [P 89 C 1, 2]

Baidyanath Narayan Sinha for Lakshmi Narain Sinha—for Appellants.*Mritunjya Lal*—for Respondents.

Chamier, C. J.—This was a suit for possession of 1 bigha 10 cottas and 16 dhurs of land, which the plaintiff said he had purchased from the first defendant, Jitan Koeri, in March 1914. It has been found by the Courts below that Jitan Koeri was joint in estate with several brathers and consequently was not entitled to sell his share in the family property. The Munsif dismissed the suit. On appeal the District Judge held that the recital in the sale-deed that the vendor was in separate possession of land covered by the sale-deed without any co-sharer, indicated an intention on his part to separate from his brothers and that as Jitan Koeri had held himself out as a separate owner of the land he should be compelled by a Court of equity to make a good title to the property sold by effecting a separation of his share from the rest of the family property. The learned Judge, therefore, allowed the appeal and gave the plaintiff a decree for partition of the property in order that he might obtain the share of his vendor Jitan Koeri in the family property. This decision appears to me to be contrary to a long line of decisions to the effect that one member of a joint Hindu family cannot, by executing a deed, transfer to another person his undivided share in the family property or give that person the right to apply for partition. It is

otherwise where in execution of a decree the undivided interest of a member of a joint Hindu family has been put up for sale. In that case the purchaser is entitled to sue for partition of the interest purchased by him. In the present case there is no reason for departing from the general rule. It appears to me that the suit for possession of the property should have been dismissed and that the District Judge was wrong in giving the plaintiff a decree for partition of the family property.

It seems that soon after the transaction in question the parties came before a Sub-Divisional Magistrate under whose order Jitan Koeri deposited in Court the sum of Rs. 100, which he had received from the plaintiff on account of the share sold. This money appears to be still in deposit in the Deputy Magistrate's Court. In my opinion the plaintiff should be allowed to withdraw that money and in addition to that to be allowed to recover from Jitan Koeri interest on that amount from the date of the sale-deed up to the present date. I would allow this appeal, set aside the order of the District Judge and dismiss the plaintiff's suit for possession as against all the defendants but give him a declaration to the effect that he is entitled to withdraw the deposit in the Deputy Magistrate's Court and give him a decree against Jitan Koeri for interest on that sum at the rate of 20 per cent. per annum from the date of the sale-deed to the date of the suit and from the date of the suit to the present date at the rate of 6 per cent. per annum. The defendants, other than Jitan Koeri, will receive from the plaintiff their costs in all three Courts.

Roe, J.—I agree.

v.s./R.K.

*Appeal allowed.***A. I. R. 1916 Patna 89 (2)**

CHAMIER, C. J. AND SHARFUDDIN, J.

Mahesh Ram Tewari—Decree-holder—Appellant.

v.

Mt. Lachhan Kuer—Judgment-debtor—Respondent.

Appeal No. 70 of 1916, Decided on 27th July 1916, from appellate order of J. C., Chota Nagpur, D/- 19th December 1915.

Limitation Act (9 of 1908), S. 15—Stay of execution—Execution pending—Judgment-debtor applying for setting aside decree and obtaining order for stay of further execution pending hearing of application—Application

dismissed — Judgment-debtor applying for review — Decree-holder applying for execution after disposal of review cannot deduct time spent by judgment-debtor in review as there was no order of stay for that period.

During the pendency of an execution proceeding the judgment-debtor obtained an order that pending the hearing of an application by him to set aside the decree passed against him further execution of the decree should be stayed. His application was dismissed. He then applied for a review of the order passed on his application. After the disposal of the application for review the decree-holder applied for the execution of the decree:

Held: that he was not entitled to deduct the time spent by the judgment-debtor in obtaining a review of the order passed on the application to set aside the decree, inasmuch as no order staying execution during the pendency of the review application had been made. [P 90 C 1]

Guru Sharan Prasad—for Appellant.

Atul Krishna Roy and Jamini Mohan Mukerjee—for Respondent.

Judgment.—The appellant's first application for execution was presented on 4th August 1911, and was struck off on 21st February 1912, because the judgment-debtor had applied to the Court to set aside the decree which had been passed ex parte against him and had obtained an order that pending the hearing of that application further execution of the decree should be stayed. The present application for execution was presented on 12th May 1915, more than three years after the first application was struck off. The appellant seeks to deduct the time spent by the judgment-debtor in applying for a review of the order passed on the judgment-debtor's application to have the ex parte decree set aside. It appears, however, that on the application for review no order was made staying further execution. There was nothing to prevent the decree-holder from prosecuting the execution of the decree during the time that the judgment-debtor's application for review was pending. We must, therefore, hold that he is not entitled to deduct that time. The result is that the present application is barred by limitation and the orders of the Courts below are correct. This appeal is dismissed with costs. Hearing fee one gold mohur.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 90

MULLICK AND ATKINSON, JJ.

Deokinandan Singh and others—Judgment-debtors—Appellants.

v.

Dhakeswar Prasad Narain Singh—Decree-holder—Respondent.

Appeal No. 313 of 1913, Decided on 20th November 1916, from original order of Sub-Judge., Gaya, D/- 29th May 1915. Civil P. C (1908), Ss. 2, 47 and O. 21, R. 66—Order fixing valuation under R. 66 is not decree and is not appealable.

An order of a Court fixing a valuation under O. 21, R. 66, Civil P. C is not a decree within the meaning of S. 2 of the Code and is therefore not appealable: 17 IC 88 and 10 IC 371, Ref; 30 Cal 617 and 8 CWN 257, Dist. [P 90 C 2]

Bankim Chandra Mukherji—for Appellants.

Gangadhar Das and Ganesh Dutt Singh—for Respondent.

Judgment.—This appeal arises out of an application for execution. In the sale proclamation the Court described the property as being worth Rs. 1,300 according to the statement of the decree-holder, and also stated that while the judgment-debtor alleged that the holding bore a naqdi rent, the decree-holder alleged that it bore both a naqdi and a bhowli rent. The judgment-debtor is dissatisfied with this order of the executing Court, which purports to have been made under O. 21, R. 66, and prefers the present appeal before us. He contends that it was the duty of the Court to fix a valuation after investigation, and also to determine whether the rent was naqdi alone or naqdi and bhowli as stated by the decree-holder. A preliminary objection has been taken by the decree-holder to the effect that no appeal lies to this court. It is conceded by the respondent before us that no appeal lies under O. 43, but it is contended that an appeal does lie under S. 47, Civil P. C. Now the matter has been considered by the Madras High Court in a Full Bench, and also in two recent decisions of the Calcutta High Court, namely, in *Panch Duar Thakur v. Mani Raut* (1) and in *Deoki Nandan Singh v. Bansi Singh* (2). These decisions are to the effect that the order of the Court fixing a valuation under O. 21, R. 66, is not a decree within the definition of "decree" under the new Civil Procedure Code of 1908. The learned vakil

1. (1912) 17 IC 88.

2. (1917) 10 IC 371.

for the respondent relies upon two cases, namely, *Ganga Prosad v. Raj Coomar Singh* (3) and *Rajah Ramessur Proshad Narain Singh v. Rai Sham Krissen* (4). But it is necessary only to state that these cases were decided under the old Civil Procedure Code before the definition of "decree" was altered. I am satisfied that upon the law as it now stands no appeal lies against an order such as that passed by the Subordinate Judge on 29th May 1915. The appeal, therefore, being incompetent is dismissed with costs, two gold mohurs. We are requested to treat the memorandum of appeal as an application for revision but this we decline to do.

V.S./R.K. *Appeal rejected.*

3. (1903) 30 Cal 617.

4. (1904) 8 C W N 257

A. I. R. 1916 Patna 91 (1)

JWALA PRASAD, J.

Aklu Ahir and another—Defendants—Appellants.

v.

Ram Lakshan Sahu and others—Plaintiffs—Respondents.

Second Appeal No. 3332 of 1914, Decided on 11th December 1916, from the decision of Addl. Dist. Judge, Shahabad, D/- 17th August 1914.

Bengal Estates Partition Act (1897), Ch. 6—Batwara papers.

Batwara papers are admissible in evidence to prove a landlord's title against the tenants who were parties to the Batwara proceedings.

[P 91 C 2]

Monmotha Nath Mukerji—for Appellants.

Harihar Persad Singh—for Respondents.

Judgment.—The respondent, who is the proprietor of Touzi No. 4076, brought a suit out of which this appeal has arisen, for a declaration that the land in suit was their zeraif land and was wrongly recorded in the Survey Record of Rights as the kasht land of the defendants. The prayer in the suit was for recovery of possession, which the plaintiffs said they had lost after the Survey Record of Rights on 15th December 1910. Both the Courts have held that the land in suit is the zeraif land of the plaintiff; the defendants have appealed to this Court. It is contended on their behalf that the lower appellate Court has decided this case entirely on the basis of the Batwara proceedings under Act 5 of 1897 and that the Batwara papers cannot override the

presumption raised by the Survey Record of Rights. The contention does not appear to be sound. In the first place, the Batwara papers under the present Act (Act 5 of 1897) are admissible in evidence against the defendants-tenants who were parties to the proceeding. Under Ch. 6, Batwara Act, a regular Record of Rights is prepared and is published in the locality and a copy of the entries is given to the landlords and the tenants concerned under S. 48 of the Act.

It has not been seriously contended that the Batwara proceedings are not admissible in evidence against the defendants. The lower Court has not only decided this case on the basis of the Batwara papers but has also based its finding upon the oral and documentary evidence on behalf of the plaintiffs-respondents. It is contended that the lower appellate Court has omitted to decide the question of limitation that arose in this case and, therefore, the point has been left undetermined. There is no reference in the judgment of the lower appellate Court showing that this point was at all raised in that Court by the appellants. It further appears that in the face of the finding of the first Court that the disputed lands were in possession of the respondents and that they were dispossessed in 1910, the question of limitation does not arise and this may have been the reason of the point not having been raised in the lower appellate Court. I, therefore, agree with the finding of the Court below and dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 91 (2)

CHAMIER, C. J. AND SHARFUDDIN, J.

Padman Lochan Misra and others—Appellants.

v.

Krishna Chandra Misra—Respondent.

Second Appeal No. 448 of 1914, Decided on 15th May 1915, from decision of Dist. Judge, Sambalpur, D/- 15th July 1914.

C. P. Land Revenue Act (1881), S. 136-G—Partition ordered by Deputy Commissioner—Appeal against, lies to High Court—Sambalpur, Civil Courts Act (1908).

In the Sambalpur District, the District Judge under the Bengal, N. W. P. and Assam Civil Courts Act (12 of 1887) has succeeded to the position of the Deputy Commissioner under the Central Provinces Civil Courts Act (16 of 1885). Therefore an order passed by the Deputy Com-

missioner under S. 126 D, Central Provinces Land Revenue Act (18 of 1881), must be deemed to be an order of the District Judge and an appeal against it lies to the High Court and not to the District Judge. [P 92 C 2]

Ramesh Chandra Mazumdar and Janaki Nath Bose—for Appellants.

Prayanath Chatterjee—for Respondent.

Chamier, C. J.—The appellants and six others applied to the Deputy Commissioner of Sambalpur, under S. 136 D Central Provinces Land Revenue Act (18 of 1881), for partition of some bhogra lands in a village. The Deputy Commissioner declined to grant the application as regards six of the applicants, until the question in dispute had been determined by a competent Court. As regards the two appellants before us, he held that they were entitled to partition. There was an appeal to the District Judge, who was of opinion that the Deputy Commissioner had adopted an inconvenient course. He set aside the order of the Deputy Commissioner and remanded the case to him for a fresh decision. The appellants have appealed to this Court on the ground that no appeal lay to the District Judge against the order of the Deputy Commissioner. S. 136 H, Central Provinces Land Revenue Act (18 of 1881) provides that all decrees and orders passed by a Deputy Commissioner under S. 136 G (the section under which order of the Deputy Commissioner now in question was passed) deciding the right of partition, shall be held to be decrees and orders of a Court of civil judicature and shall be open to appeal as if passed by the Court of the Deputy Commissioner, acting as a Court of civil judicature of first instance under the Central Provinces Civil Courts Act, 1885. Under S. 8, Central Provinces Civil Courts Act, 1885, the Deputy Commissioner was to be deemed to be the District Judge of the District and his Court to be the District Court or principal civil Court of original jurisdiction in the District. The Central Provinces Civil Courts Act, 1885, was repealed by the Central Provinces Courts Act (2 of 1904) which provided for the establishment of four new grades of Courts, the Divisional Court, the District Court, the Court of the Subordinate Judge and the Court of the Munsif. S. 13, sub-S. (1) (c), of that Act provided that the District Court should be deemed to be the principal civil Court of original jurisdiction in

the civil district. From this it appears that the District Court was substituted for the Court of the Deputy Commissioner as the principal civil Court of original jurisdiction in the District. Bengal Act (4 of 1906) repealed the Central Provinces Courts Act, 1904, as regards the District of Sambalpur and extended to that district in its place the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887. Under S. 18, of the last mentioned Act the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of S. 15, Civil P. C., to all original suits for the time being cognizable by civil Courts.

But the Court of the District Judge is superior to that of the Subordinate Judge and is the principal civil Court of original jurisdiction in the District. It is thus clear that the District Judge under the Bengal, N. W. P. and Assam Civil Courts Act, 1887, has succeeded to the position of the Deputy Commissioner as District Judge under the Central Provinces Civil Court Act, 1885. An appeal lies against the decree of a District Judge in a suit of any value, however small, to the High Court. It is contended before us that the decision of the Deputy Commissioner in the present case, which is valued at Rs. 120 only, should be treated as the decision of a Subordinate Judge because, if the suit had been one of a purely civil nature, it would have lain in the Court of the Subordinate Judge. As a matter of fact it appears that it would have lain in the Court of a Munsif, but the value of the suit is irrelevant for the purpose of deciding the present question. In my opinion, the Court of the District Judge has taken the place of the Court of the Deputy Commissioner as the principal civil Court of original jurisdiction under the Act of 1885 and, therefore, the decision of the Deputy Commissioner in the present case must be deemed to have been a decision of a District Judge. The appeal, therefore, lay to this Court and not to the District Court. I would allow this appeal, set aside the order of the District Judge and direct that the memorandum of appeal to the District Judge be returned to the respondent for presentation to the proper Court. The respondent must pay the costs of the appellants in this Court.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 93

CHAMIER, C.J. AND SHARFUDDIN, J.
Lal Narupraja Singh — Plaintiff —
 Appellant.

v.

Bhabani Teli — Defendant — Respondent.

Second Appeal No. 2878 of 1914, Decided on 19th May 1916, from decision of Dist. Judge, Manbhum, D/- 14th May 1914.

(a) C. P. Land Revenue Act (1881), S. 65-A — Protected gaontia can surrender his tenure — Adverse possession — Nature and commencement of, stated.

Plaintiff's ancestor, who was zamindar of the village in dispute, granted a lease of it in gaontia tenure to one D, and fresh leases were in succession granted to his son and grandson, the last named becoming a "protected" gaontia under S. 65-A, Central Provinces Land Revenue Act, 1881. On his death in 1900, his second son K was recorded as gaontia and in 1907 the latter surrendered the tenure to the plaintiff. In 1911 the plaintiff sued defendants for possession of the lands and the latter, all of whom belonged to the family of the gaontia, resisted the zamindar's claim on the grounds that K had no power to surrender the tenure to the plaintiff, that they had been in adverse possession of the lands both as against the gaontia and as against the zamindar and that the suit was barred by limitation:

Held: (1) that there was nothing in the incidents of the tenure of a "protected" gaontia, as set out in S. 65-A, Central Provinces Land Revenue Act, 1881, which in any way suggested that a gaontia was not entitled to relinquish his rights; [P 94 C 1]

(2) that the suit was not barred by limitation as possession could not be adverse to a person who was not himself entitled to claim present possession, and so long as the gaontia tenure subsisted, the zamindar was not entitled to actual possession of any portion of the village and the possession of the defendants did not become adverse to the plaintiff until the tenure was relinquished in 1907. [P 94 C 1]

(b) C. P. Land Revenue Act (1881), S. 65-A — Gaontia cannot confer permanent rights.

A gaontia cannot confer rights of a permanent character in the village which would be binding upon the zamindar after the gaontia tenure ceases to exist. [P 94 C 2]

Janakinath Bose — for Appellant.

Priyanath Chatterjee — for Respondent.

Chamier, C. J. — This appeal is connected with Second Appeals Nos. 2879 and 2880 of 1914 and this judgment will govern all three appeals.

The appellant brought the three suits out of which these appeals have arisen for the possession of plots of land in Mauza Sargipali, of which the appellant is the zamindar. The facts are that in 1845 an ancestor of the appellant leased

the village in gaontia tenure to one Dhunda. Fresh leases were given in succession to the latter's son Gajadhar and grandson Karuna. The last named, who became a "protected" gaontia under S. 65-A, Central Provinces Land Revenue Act, 1881, died in 1900, leaving three sons of whom Mohan was the eldest. Mohan would have succeeded in the ordinary course to the position of gaontia, but he resigned in favour of the second son Kuber who was then recorded as gaontia. In 1907 Kuber surrendered the tenure to the zamindar. The respondent in Second Appeal No. 2878 is a younger brother of Karuna, the respondent in Second Appeal No. 2879 is a nephew of Karuna and the respondent in Second Appeal No. 2880 is a cousin of Karuna. All three are therefore closely related to the men who have held the village as gaontia. The plots held by the respondents are part of the bhogra land of the village. Here it may be explained that the rent payable by a gaontia to his zamindar was usually the sum which the gaontia was expected to collect from the tenants. His profit or remuneration for collecting the rents was what he could get out of the bhogra lands which appear to be not unlike what are known elsewhere as *sir* lands. Many years ago, it is not known when, the bhogra lands were divided up amongst the members of the gaontia's family, probably in order to supply them with separate maintenance. When Kuber relinquished the tenure in 1907, the zamindar obtained possession of the bhogra plots held by other members of the family, but the respondents to these appeals refused to give up the plots held by them.

The questions for decision are: (i) whether the respondents were bound to give the plots up to the zamindar, and (ii) if so, whether these suits were brought within limitation. The learned District Judge has answered the first question in the affirmative, but the second in the negative.

The learned vakil for the respondents concedes that a gaontia of the kind now in question was, before the passing of Act 12 of 1898, by which S. 65-A was inserted in the Central Provinces Land Revenue Act, 1881, no more than a thikadar or farmer of the village. This is in accordance with the opinion expressed by Mr. Nethersole in his Settlement Report. I have had no experience of cases relat-

ing to the tenures of a gaontia of this kind, but I assume that the learned vakil is right in saying that a gaontia was before 1898 no more than a thikadar.

Section 65-A provides that the settlement officer may in certain circumstances declare a gaontia to be "protected" for the purpose of that section, or give him the right of an occupancy tenant in respect of the whole or part of the land in his cultivation. The settlement officer may also fix the jama payable by the gaontia. The incidents of the tenure of a "protected" gaontia are set out, namely, that the tenure is heritable but not transferable and descends to a single heir in accordance with certain rules. It is common ground that formerly, at all events, a gaontia of this kind could not sublet his rights, and it is clear that he could not create in the village any tenure of a permanent character which would hold good after his lease came to an end.

The respondents say that they have been in possession of the lands in suit for a great many years (an assertion which is not disputed) and that their possession has been adverse not only to the gaontia for the time being, but also to the zamindar.

But possession cannot be adverse to a person who is not himself entitled to claim present possession. So long as the gaontia tenure subsisted, the zamindar was not entitled to actual possession of any portion of the village. The possession of the respondents did not become adverse to the appellant till the tenure was relinquished in 1907. The present suits were instituted in 1911 and were therefore within time.

The first Court found that the relinquishment was a collusive transaction and a sham, but the lower appellate Court found that it was a reality and valid. It was contended before us that a "protected" gaontia is unable to relinquish his rights. No authority was cited in support of this contention, and I can discover nothing in the incidents of the tenure of a "protected" gaontia as set out in S. 65 A, Central Provinces Land Revenue Act, which in any way suggests that a gaontia is not entitled to relinquish his rights. The land held by the respondents seems to have come into their possession even before Karuna became gaontia. Karuna and after him Kuber seem to have held under inde-

pendent leases. If so it cannot be said that by relinquishing the tenure Kuber was acting against the interests of his own grantees or the grantees of any person through whom he claimed. This point however is not of any importance, for, as already stated, a gaontia could not confer rights of a permanent character in the village which would be binding upon the zamindar after the gaontia's tenure ceases to exist.

For these reasons I am of opinion that the respondents are not entitled to retain the lands in suit and these suits are not barred by limitation. I would allow these appeals and decree the claims in these suits with costs in all three Courts. The amount of mesne profits claimed will be ascertained by the Court of first instance.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeals allowed.

A. I. R. 1916 Patna 94

CHAMIER, C. J. AND SHARFUDDIN, J.

Mahadeo Chaudhary and another—
Plaintiffs—Appellants.

v.

Bhagelu Sahu and others—Defendants
—Respondents.

Letters Patent Appeal No. 67 of 1916, Decided on 19th December 1916, against judgment of Atkinson, J., in Second Appeal No. 2114 of 1915, D/- 14th June 1916, reported in *A. I. R. 1916 Pat. 78*.

Landlord and Tenant—Tenant completely transferring his occupancy holding—Village in possession of "ticcaddar"—Landlord's only relief is to get declaration that transfer does not bind him—He cannot get 'khas' possession before expiry of "ticca."

When a tenant transfers his occupancy holding in its entirety, the village being in possession of ticcaddars, the only relief to which the landlord is entitled is to get a declaration that the transfer is not binding on him and that he will be entitled to possession on the expiry of the ticca. He is not entitled to khas possession of the holding before the expiry of the ticca. [P 95 C 2]

Atul Krishna Ray—for Appellants.

Lakshmi Narayan Singh, Baidyanath Narayan Sinha and Guru Saran Prasad—for Respondents.

Chamier, C. J.—This was a suit by the appellants for possession of 2 cottahs 2 1/3 dhurs of land. It appears that the land in question formed part of an occupancy holding of 4 cottahs 11 dhurs, which was the property of the respondent Bullaki Sah. It further appears that Bullaki Sah sold 2 cottahs 8 1/2 dhurs to other persons.

Then in July 1907 he sold the remainder of his holding, viz. 2 cottahs 2 1/2 dhurs, the land now in suit, to the respondent Bhagelu. The appellants, who are the landlords, brought this suit in August 1913 claiming possession of the 2 cottahs 2 1/2 dhurs and in the alternative a declaration that the transfer in favour of the respondent Bhagelu Sahu was inoperative against the appellants. The Munsif decreed the claim for possession and his decision was confirmed on appeal by the District Judge. On appeal to this Court it was held that the appellants were not entitled to succeed in the suit for three reasons, viz. first, that they sought to recover only a part of the holding as originally created, secondly, that they were not entitled to present possession of the property inasmuch as they had granted a ticca for a long term of years to other persons who were impleaded as defendants third party in the Court of first instance, and thirdly, because the ticcadar of the appellants had accepted rent from the respondent Bhagelu Sahu and had thereby acquiesced in the transfer to him and that the appellants were bound by the action of the ticcadars. In this appeal it is contended that the first reason given for dismissing the appellant's suit is unsound and that it was not open to the learned Judge to dismiss the suit on the third ground, as that ground was abandoned in the Court of first instance and was not raised in the first appellate Court or in appeal to this Court. It is unnecessary for us to express any opinion as to the soundness of the first ground given for dismissing the suit so far as it is a suit for possession, for there can be no doubt that the appellants, are not entitled to a decree for possession while the ticca in favour of the defendants, third party, remains in force.

The third reason given for dismissing the suit, in my opinion, is inadmissible. The judgment of the first Court shows that this objection to the suit, with some other objections, was abandoned at the trial and the record shows that no attempt was made to re-assert the objection either in appeal to the District Judge or in appeal to this Court. The result is that there is no finding on the question of fact which underlies this objection. The learned Judge must have overlooked the fact that this objection had been abandoned and that consequently the necessary finding of fact was wanting. In my opi-

nion, the learned Judge was right in holding that the suit as a suit for possession could not be maintained, but the question is whether the appellants are entitled to a declaration that the transfer to respondent Bhagelu Sahu is not binding upon them. When the transfer in question was made, the tenant according to the concurrent findings of the first and second Courts transferred the whole of his remaining interest in the holding. It appears to me that but for the ticca there would have been no answer to the appellant's suit. I see no reason why the appellants should not be given a declaration. They have from the very first asked the Court to make a declaration in case a decree for khas possession could not be made. On the facts as now found there can be no doubt that the transfer of 2 cottahs 2 1/2 dhurs is not binding on the appellants and that the appellants will be entitled to possession on the expiry of the ticca.

I have omitted to mention that it was suggested before us that the claim for a declaration was barred by limitation. As already stated, the claim for a declaration was made in the plaint. In none of the Courts below was it ever suggested that this claim was barred by limitation. The suit was brought a month after the expiry of six years from the date of the transfer and there was a definite allegation made in para. 6 of the plaint that the appellants had not come to know of the transfer, until a date which is within limitation. Even that assertion, the object of which must have been obvious to anyone who read the plaint, did not elicit from the defendants the plea that the suit was beyond limitation either in whole or in part. I think that we ought to decline to consider such a belated plea of limitation. I would allow this appeal in part and make a declaration in favour of the appellants that the transfer in favour of the respondents Bhagelu Sahu is inoperative against the appellants. The claim for possession will, however, stand dismissed. The parties will pay their own costs throughout.

Sharfuddin, J.—I agree.

V.S /R.K. *Appeal partly allowed.*

A. I. R. 1916 Patna 96

ROE AND JWALA PRASAD, JJ.

Rajendra Prasad—Defendant—Appellant.

v.

Bahuria Raten Jota Kuer—Plaintiff—Respondent

First Appeal No. 137 of 1914, Decided on 2nd November 1916, from decision of Sub-Judge, Chapra, D/- 11th September 1913.

(a) Transfer of Property Act (4 of 1882), S. 72—S. 72 covers case of payment made to save mortgage security but not where right, title and interest only of mortgagor is put up for sale.

The payment of a public charge for which a mortgaged property may not be summarily sold cannot be constituted a charge upon the property. S. 72, T. P. Act, does not cover a case in which the right, title and interest only of the mortgagor is to be put up for sale. It covers only case of a payment made to save the security itself. [P 96 C 2]

(b) Transfer of Property Act, (1882), S. 72—Mortgagee cannot add expenses for payment of cess to the mortgage security.

A mortgagee is not entitled to add the expenses incurred for payment of cess to the mortgage security. [P 96 C 2]

Tribhuban Nath Sahay—for Appellant.

Rajendra Prasad—for Respondent.

Judgment.—The appellant in this case is the first mortgagee. This respondents are the second mortgagees. The respondents are the plaintiffs and claim to recover property on deposit of the amount originally advanced on the mortgage. The appellant put in a bill for large sums of money spent on debts incidental to the upkeep of the zamindari such as, repairs to bandhs, payments of road cess, etc., and claimed under S. 72, T. P. Act, these sums from the mortgage security. The learned Subordinate Judge disallowed these claims, and gave a decree for redemption on the basis of the sum originally advanced. In appeal it is not seriously urged that the sums spent on zamindari amla should be added to the mortgage security, but it is urged that the upkeep of the bandhs was necessary for the preservation of the property and that the amount paid as road-cess was paid under S. 76, Cl. (3), as a public charge and that therefore under S. 72, T. P. Act, should be made a charge upon the property. It is not necessary to deal at length with the question of the liability of the property for money spent on the preservation of its irrigation system.

Undoubtedly the mortgagee in possession is required to keep the property in repair and reasonable expenditure upon irrigation comes under the head of keeping the property in repair.

The difficulty is that the only account of this expenditure is to be found in the written statement and that it is in many instances absolutely preposterous. It is supported by a number of zamindari account books but it cannot be suggested that these in themselves are of any material value. It is particularly noteworthy that in the earlier years of possession of the mortgagee the amount spent was Rs. 2, 3 and 4 a year, whereas, during the years 1306 to 1310, it is set down at over R. 250. It is impossible for us to say what sums were actually expended for the bare keeping of the property in repair and what sums were spent on improvements of the property. We are therefore unable to assess any figure as payable under this head. The question whether the mortgagee is entitled to add cesses to his mortgage security is one upon which there is no ruling in the official reports directly in point. The commentators are agreed that the payment of a public charge for which the property may not be summarily sold cannot be constituted a charge upon the property, and this view is in consonance with the view taken in *Upendra Chandra Mitter v. Tara Prosanna Mukerjee* (1). S. 72 does not seem to us to cover a case in which the right, title and interest only of the mortgagor is to be put up for sale. It does cover the case of a payment made to save the security itself. We are not disposed to accept the view that it covers payments made to save the equity of redemption, for it seems obvious that the sale of the equity of redemption is a matter with which the mortgagee is in no way concerned and a matter to which, whether he is in possession of the property or not, the mortgagor should be required to attend himself. We accept the view taken by the commentators. The mortgagee is not entitled to add the expenses he incurred for payment as cess to the mortgage security.

A further objection taken to the decree made by the learned Subordinate Judge is that the mortgage itself stipulates that payment of the sum advanced must

be made 30th of Bhadra of any given year. The payment in the particular case was made by deposit in the local treasury on 22nd Bhadra and service of notice not effected until 5th of Asin. We are of opinion that there is no force in this contention, as it is in evidence that tender was made of the money before the payment was made in the local treasury. The appeal fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 97

CHAMIER, C. J. AND SHARFUDDIN, J.
Rajkumar Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 8 of 1916, Decided on 2nd June 1916, against order of Dist. Judge, Shahabad, D/- 4th February 1916.

(a) Criminal P. C. (1898), S. 476—S. 476 does not restrict Court's action only to offences committed within its jurisdiction or within province in which it is situated (Per Chamier, C. J.)

Per Chamier, C. J.—Section 476 does not appear to restrict the action of the Court to offences committed within its own jurisdiction or even within the province in which the Court is situated. [P 98 C 2]

(b) Criminal P. C. (1898), S. 476—Jurisdiction — S. 476 is self-contained and is applicable where offences are brought to Court's notice in course of Judicial proceeding (Per Sharfuddin, J.)

Per Sharfuddin, J.—Section 476, is a self-contained section and the reference made to S. 195 of the Code is only for the purpose of avoiding the enumeration of the sections mentioned in S. 195. The most important element in S. 476 is that the offences referred to in S. 195 should either be committed before the prosecuting Court or brought under its notice in the course of a judicial proceeding, when that Court may proceed as provided by S. 476. [P 98 C 2]

If an offence has been committed, no matter where, and if in the course of a judicial proceeding it is brought to the notice of a Court that such an offence has been committed, that Court has jurisdiction to proceed under S. 476.

[P 98 C 2]

Petitioner instituted a suit at Bilaspur against a resident of Arrah and obtaining a decree sought to execute it at Arrah by means of a transfer. The judgment-debtor then instituted a suit at Arrah to have the decree of the Bilaspur Court set aside, on the ground that it had been obtained by fraud. The suit was decreed, and petitioner's appeal to the District Judge, Arrah, was dismissed. The District Judge, finding that the petitioner had brought a false suit and had obtained a decree by fraud and by tampering with the service of summonses, etc., directed his prosecution under Ss. 209 and 210, I. P. C.:

Held: that the District Judge had jurisdiction to take action against petitioner under S. 476,

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Criminal P. C., as the offences alleged to have been committed by him were brought to the notice of the District Judge in the course of a judicial proceeding. [P 97 C 2]

Bahadurji and Nirsu Narayan Sinha
—for Applicant.

Manuk—for the Crown.

Chamier, C. J.—This is an application for revision of an order of the Sessions Judge of Arrah, directing the prosecution of the three applicants for offences under Ss. 209 and 210, I. P. C. The first applicant brought a suit in Small Cause Court at Bilaspur in the Central Provinces against Ramkesawar Koir, a resident of the Arrah district in this province and obtained a decree ex parte. The decree was at his instance transferred for execution to the Court of the Subordinate Judge of Arrah and application was made for the arrest of the judgment-debtor. The latter then brought a suit in the Court of the 1st Munsif of Arrah to have the Bilaspur decree set aside on the ground of fraud and obtained a decree which was confirmed on appeal by the District Judge of Arrah. The learned Judge directed the prosecution of the three applicants for offences under Ss. 209 and 210, I. P. C., as he found on the evidence that they had combined to bring a false suit against Ramkesawar Koir and had obtained a decree against him by concealing from him the institution of the proceedings and tampering with the service of summonses. An appeal has been presented to this Court against the decision of the District Judge in the civil case and has been admitted. The first ground on which the order under S. 476, Criminal P. C., has been challenged is that the first Munsif of Arrah had no jurisdiction to entertain the suit to set aside a decree passed by a Court in another province. In view of the decision in *Jawahir v. Neki Ram* (1) in which I took part and the authorities there cited, I doubt whether there is much force in this contention. But we are not now concerned with the question of the jurisdiction of the Munsif, for there can be no doubt that the District Judge of Arrah had jurisdiction to entertain an appeal against the Munsif's decision. The hearing of the appeal by the District Judge was a judicial proceeding and the offences alleged to have been committed by the three applicants were

1. A I R 1915 All 163=28 I C 502=37 All 189.

brought to his notice in the course of that proceeding.

The second point taken is that S. 476, Criminal P. C., should be read with S. 195 of the same Code, and that the words in the former section "any offence referred to in S. 195" mean only the offences mentioned in that section which are committed under the qualifying circumstances mentioned in that section, i. e., to come to the particular case before us, the contention is that S. 476 does not authorize a Court to take action in respect of offences under Ss. 209 and 210, I. P. C., unless those offences were committed in or in relation to a proceeding in a Court. This is a matter upon which there has been some difference of opinion. On one side are the decision in *In re Devji* (2), *In re Keshav Narayan Manolkar* (3), and *Akhil Chandra Sen v. Empress* (4), while on the other are the decisions in *Abdul Khadar v. Meera Saheb* (5) and *Jadunandan Singh v. Emperor* (6), in which the Court endeavoured to distinguish the case of *Akhil Chandra Sen v. Empress* (4) from the case then before it. It is unnecessary for us in this case to choose between these two conflicting views, for the offences supposed to have been committed by the applicants were committed, if at all, in a proceeding in a Court—the case against them being that they fraudulently brought a false suit or claim in a Court and fraudulently obtained a decree for a sum which was not due. So far as this point is concerned, it must be held that the District Judge had jurisdiction to take action against the applicants under S. 476, Criminal P. C.

The third point taken is that the District Judge had no jurisdiction to take action in respect of offences committed outside the local jurisdiction of his Court, and reliance is placed upon S. 177, Criminal P. C. No authority has been produced in support of this contention and there are at least two reported cases in which Courts took action in respect of offences committed in another district or province: see *Girwar Prasad v. Emperor* (7) and *Kamta Prasad v. Emperor* (8).

2. (1884) 18 Bom 581.

3. (1912) 17 I C 720.

4. (1895) 22 Cal 1004.

5. (1892) 15 Mad 224.

6. (1910) 37 Cal 250=4 I C 710.

7. (1909) 1 I C 206.

8. (1911) 33 All 396=9 I C 497.

S. 476, Criminal P. C., does not appear to restrict the action of the Court to offences committed within its own jurisdiction or even within the province in which the Court is situated. In my opinion, the District Judge of Arrah had jurisdiction to take action in this case under S. 476. In the last resort it was urged that criminal proceedings should not be taken against the applicants until the second appeal to this Court has been disposed of. It may be undesirable to allow criminal proceedings to be taken during the pendency of civil proceedings in which the same question of fact is in issue, but that is not the case here. In the appeal to this Court the question for decision is whether the Munsif of Arrah had jurisdiction to entertain a suit to set aside the Bilaspur decree. Even if the appeal is allowed on that ground, the applicants should be prosecuted if they fraudulently brought a false claim and fraudulently obtained a decree for a sum which was not due to them. I would reject this application. This order will govern Civil Revision No. 9 of 1916 also.

Sharfuddin, J.—I have had the advantage of reading the judgment of the learned Chief Justice and, fully agreeing with the views expressed therein, I desire to observe that it appears to me, from the wording of S. 476, Criminal P. C., that it is a self-contained section and that the reference made to S. 195 of the Code is only for the purpose of avoiding the enumeration of the sections mentioned in S. 195. The most important element in S. 476 is that the offences referred to in S. 195 should either be committed before the prosecuting Court or brought under its notice in the course of a judicial proceeding, when that Court may proceed as provided by S. 476. It is clear, therefore, that if an offence has been committed, no matter where, and if in the course of a judicial proceeding it is brought to the notice of a Court that such an offence has been committed, that Court has jurisdiction to proceed under S. 476. Learned counsel on behalf of the appellant urged that the words "brought to its notice in the course of a judicial proceeding" mean that the offence should have been committed in reference to the judicial proceeding then pending in that Court. In the present case the false case was instituted in one of the towns of the Central Provinces and an ex parte decree was

obtained by the plaintiff of that suit from the Central Provinces Court. That decree was attempted to be executed in the District of Shahabad, on a transfer. It was then that the defendant of that suit for the first time came to know that such a decree had been passed against him by the Central Provinces Court. It appears that the decree-holder, who is now the petitioner, obtained that decree by suppression of the summons in the Shahabad District. It was then that the defendant of that suit instituted a suit in the Munsif's Court at Arrah for a declaration that the ex parte decree was obtained by fraudulent means. The Munsif of Arrah gave a decree to the plaintiff of this suit, on which there was an appeal to the District Judge. There can be no doubt that this appeal lay to the District Court. The hearing of this appeal by the District Court was a judicial proceeding, and in the course of this judicial proceeding it was brought to the notice of that Court that the present petitioner had obtained an ex parte decree against the opposite party by suppression of the summons in the District of Shahabad; and hence I am of opinion that the Arrah District Court had jurisdiction to put the law in motion under S. 476, Criminal P. C., and the application on the above ground is rejected.

V.S./R.K. *Application rejected.*

A. I. R. 1916 Patna 99

JWALA PRASAD, J.

Muhammad Abu Zafar — Plaintiff — Appellant.

v.

Ram Pershad Kumar — Defendant — Respondent.

Second Appeal No. 1821 of 1915, Decided on 5th December 1916, against decree of Addl. Sub-Judge, Monghyr, D/- 25th April 1915.

Bengal Village Choukidari Act (1870), S. 48—Chaukidari chakran land—Settlement with one of several zamindars — Collector has no jurisdiction.

The Collector has no jurisdiction to settle village chowkidari chakran land with only one of several zamindars under S. 48 of Act 6 of 1870; 21 Cal 626, *Foll.* [P 100 C 1]

Muhammad Tahir—for Appellant.

Baidya Nath Narain Sinha and Siv-anandan Rai—for Respondent.

Judgment.—The dispute in this case is in respect of a choukidari chakran land, consisting of 1 bigha 2 cottas and 16

dhurs. The appellant is one of the zamindars of the estate in which the land in dispute is situate. He owns 14 gandas share in the said estate. The respondent owns 3 gandas share in the estate. The land was transferred to the appellant by the Collector under S. 48 of the Village Choukidari Act 6 of 1870. The defendant-respondent had taken a settlement of the land in suit from the Collector subsequent to the settlement of it with the plaintiff. The defendant's settlement, however was cancelled by the Collector at the instance of the plaintiff-appellant. The land is in possession of the defendant by virtue of his purchase against the previous choukidar who was in possession of the chakran land. The plaintiff has brought this suit for recovery of possession of the land on the basis of the settlement made with him by the Collector under Ss. 48 to 51 of the said Act. The lower appellate Court has held that the defendant's possession as an auction-purchaser of the land is invalid as against the plaintiff inasmuch as the previous choukidar had no transferable interest in the land in suit.

This view is correct. The learned Subordinate Judge has held that the defendant is entitled to remain in possession of the land to the extent of his share in the zamindari. This is also correct. He has however given a decree to the plaintiff to the extent of 14-gandas share in the land in dispute, representing his share in the zamindari. The defendant has been allowed to remain in possession of the rest of the land. The plaintiff has appealed to this Court contending that the lower appellate Court should have given him a decree for the entire land in suit on the basis of the settlement made with him by the Collector. The respondent has filed a cross-appeal contending that the entire suit should have been dismissed on the ground that the settlement by the Collector was invalid and also because the defendant's purchase in the mortgage decree was good and valid. I agree with the finding of the lower appellate Court that the previous choukidar had no transferable right in the land and hence the respondent cannot have any right in the land on the basis of his purchase at the auction-sale as against the plaintiff zamindar who took settlement of it from the Collector. As to the validity and the effect of the settlement made by

the Collector, I would refer to S. 48 of the said Act. This section enacts that all choukidari chakran lands shall be transferred to the zamindar of the estate or tenure in which such lands may be situate. The Collector is bound to transfer the lands to the zamindar of the estate and to no one else: vide *Bejoy Chand Mahatab Bahadur v. Kristo Mohini Dasi* (1). The word "zamindar" has been defined in S. 1 of the Act to mean

"the person whose name is registered in general register of estates paying revenue directly to Government as the proprietor of an estate &c."

Both the appellant and the respondent are zamindars within the meaning of the term. Under S. 14, Act 1 of 1899 as also under S. 13, Act 10 of 1897, B. C. (General Clauses Act) words in the singular shall include the plural, and vice versa. The word "zamindar" therefore under S. 48 of the said Act means all the zamindars of the estate where there are several. The Collector therefore should have transferred the land to all the zamindars of the estate and not to one only in preference to the others. He was bound therefore to settle the lands with the defendant to the extent of his share in the estate. As a matter of fact the defendant did take settlement of the land from the Collector, but the Collector cancelled the settlement with him at the instance of the plaintiff. He was willing to take the settlement and the Collector had no right to refuse it. The settlement of the land with the plaintiff of the share of the defendant in the land is without any jurisdiction. The plaintiff has no right to take possession of the land to the extent of the share of the defendant. But the defendant's possession under his purchase at the auction-sale having been held invalid, he is not entitled to remain in possession of the land in excess of his 3-gandas share. Other zamindars of the estate have not come forward and it is not known whether they were willing or not to take the settlement. They are not even parties to this suit. The plaintiff is entitled to the possession of the land excluding only 3 gandas of it which represents the defendant's share in the estate. The settlement of the land with the plaintiff is not invalid in respect of the other shares of the other zamindar as the Collector could make settlement of that share with the plaintiff or anybody else if the other zamin-

dars did not take the settlement: vide Choukidari Manual of 1908 by Wheeler, p. 46. The decree of the lower Court is upheld to the extent of 3-gandas share in the land belonging to the defendants, subject to the proportionate assessment of revenue over the share. The decree of the Court is modified to this extent that the plaintiff shall recover possession of the rest of the disputed land, deducting 3-gandas share of the defendants. The appeal is decreed in part with proportionate costs. The cross-appeal is dismissed with costs.

V.S./R.K.

Appeal decreed.

A. I. R. 1916 Patna 100

JWALA PRASAD, J.

Mohammad Latif Khan—Plaintiff—Appellant.

v.

Bajo Koiri—Defendant—Respondent.

Second Appeal No. 552 of 1916, Decided on 8th December 1916, against decree of J. C., Chota Nagpur, D/- 28th February 1916.

Chota Nagpur Tenancy Act (1908), S. 208—Auction-purchaser is entitled to be put in possession of property failing which his remedy by civil suit is not barred—**Bengal Rent Recovery Act (1865), Ss. 11, 4 and 16**—**Limitation Act (1908), Art. 138.**

A purchaser under a sale held under the Chota Nagpur Tenancy Act is entitled to be put in possession of the property purchased by him under S. 11, Bengal Rent Recovery Act. If he fails to obtain possession under that Act, his remedy to obtain possession by a civil suit is not barred, if the suit is brought within twelve years of the sale as required by Art. 138, Limitation Act. [P 101 C 1]

Mustafa Khan—for Appellant.

Judgment.—The appellant is the landlord of the respondent. He purchased the holding of the respondent in execution of his rent decree. The sale was held in February 1910. He did not apply for delivery of possession and the holding is still in possession of the respondent. In May 1914 he instituted the present suit in the Court of the Munsif of Chapra for recovery of possession of the land purchased by him at the auction-sale. The lower appellate Court has dismissed the suit, holding that the plaintiff has no remedy in the civil Court as he failed to seek his relief in the Revenue Court that held the sale. I think that this view is incorrect. It is open to the purchaser at an auction-sale to apply to the Court that held the sale for de-

livery of possession, or to bring a regular suit. The two remedies are concurrent : *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal* (1), *Bhagwati v. Banwari Lal* (2). In *Sasibhusan Mookerjee v. Radhanath Bose* (3) it was laid down that if the auction-purchaser were to sue the judgment debtor for declaration of title and for recovery of possession at any time within twelve years from the confirmation of sale, there would be no answer to the claim of the auction-purchaser. The above authorities have been followed recently by the Full Bench of this Court in *Adbul Gani v. Raja Ram* (4), where the question was whether an appeal lies from an order under R. 95, O. 21, Civil P. C. I do not find any difference in sales 'held' under the Chota Nagpur Tenancy Act, 6 of 1908, S. 208, read with the Bengal Rent Recovery Act 8 of 1865, Ss. 4 to 16, and those held under the Code of Civil Procedure. The title vests in the purchaser under the sale held under the Chota Nagpur Tenancy Act, and the purchaser is entitled to be put in possession under S. 11, Rent Recovery Act. If he fails to obtain possession under that Act, his remedy to obtain possession by a civil suit is not barred. The purchaser's remedy is alternative and if the suit is brought within twelve years from the date of the confirmation of the sale, it will not be barred under Art. 138, Limitation Act. I therefore hold that the present suit is not barred. The appeal is decreed with costs throughout.

V.S./R.K.

Appeal allowed.

1. (1887) 14 Cal 644.

2. (1909) 31 All 82=1 I C 416.

3. A I R 1915 Cal 137=25 I C 267.

4. (1916) 1 P L J 232=35 I C 468.

A. I. R. 1916 Patna 101

CHAMIER, C. J. AND JWALA PRASAD, J.

Mt. Kaniz Zohra and another — Judgment-debtors—Appellants.

v.

Syam Kisen and another — Decree-holders—Respondents.

Appeal No. 164 of 1914, Decided on 21st December 1916, from Appellate Order of Dist. Judge, Gaya, in Misc. Appeal No 56 of 1913.

Limitation Act (9 of 1908), Art. 182—Application for execution made in July 1909—Sale set aside and execution dismissed in February 1910—Fresh application for execution by sale made in December 1912—

Last application is continuation of previous one and is not barred.

An application for execution of a decree was made in July 1909, in pursuance of which the property attached was sold. The sale was set aside at the instance of the judgment-debtors on 12th February 1910, and the execution case was dismissed. A fresh application for execution by sale of the same property was made on 10th December 1912:

Held: that the last application must be taken as a continuation of the previous application, and was, therefore, within time. It could also be treated as an application under Art. 181, Sch. 1, Lim. Act, and was within time, inasmuch as it was made within three years of the date on which the sale was set aside. [P 102 C 2]

Khurshaid Husnain — for Appellants.

Rajendra Prasad—for Respondents.

Chamier, C. J.—This is an appeal by the judgment-debtors against an order of the District Judge of Gaya, confirming an order of the Munsif of Gaya, whereby the present appellants' application to have the sale of their immovable property set aside was dismissed. The only question which we have to decide in the present appeal is whether, as contended by the appellants, the application for execution in pursuance of which the sale was held was barred by limitation. It appears that the decree was passed on 20th June 1905, and that the first application for execution was made in August 1906, and was dismissed in February 1907. A second application for execution was made in July 1909, and the property of the appellants was sold on 14th December 1910. The appellants applied to have the sale set aside and the sale was set aside on 12th February 1910. The present application for execution was made on 10th December 1912. If the present application for execution is treated as an original application for execution and as being governed by Art. 182, Sch. 1, Lim. Act, it is barred by limitation, for the application was made more than three years after any of the dates specified in Col. 3, Art. 182. Both Courts below have treated the application as one made in continuation of the second application. In this Court it is contended that the present application is neither in form nor in fact an application made in continuation of the second application. The application recites the first application, the dismissal of that application, the making of the second application, the sale of the property on 14th December 1909, and the fact that the sale was set aside in February 1910 and it asks the

Court to issue a notice and take proceedings under O 21, R. 66, that is to say, prepare a proclamation of sale and thereafter sell identically the same property as that which was sold in December 1909.

So far as the form of the application is concerned, I see no difficulty whatever in treating it as a request made to the Court to take up the previous application and take proceedings to bring the property to sale. It is said that the Court cannot hold that this application is one made in continuation of the previous application because the previous application was in fact dismissed. There is before us a copy of the order sheet in execution file No. 222 of 1909, which shows that immediately after the order setting aside the sale, the Court wrote the following words: "No steps taken. Dismiss the execution case." It is said that it is impossible to continue an application which has been dismissed. It appears to me that that the words in question were not intended to do more than strike the execution case off the file, for the Court could not have expected the decree-holder, immediately on hearing the order of the Court setting aside the sale, to present another application for execution. I am not prepared to hold that the Courts below were wrong in treating the present application as one made in continuation of the previous application.

It may often happen that proceedings taken upon an application for execution remain pending in an original Court or Court of appeal for several years and may result in an order setting aside a sale of immovable property many years after the application for execution was presented and many years after any of the dates indicated in Col. 3, Art. 182, Sch. 1, Lim. Act. This has often been pointed out by the Courts and in order to get over the difficulty, some Courts have held that a subsequent application should be treated as an application made in continuation of the application made before the sale, and other Courts have held that such an application is governed by Art. 181, Sch. 1, Lim. Act, and that the decree-holder is entitled to three years from the date on which the sale is set aside within which to make a further application. It seems certain that the legislature could not have intended that further execution of a decree should be prevented by the fact that execution proceedings remained pending

in the Courts for many years. In the present case as the third application was one asking the Court to sell the identical property which had been sold before, I think that we should hold that the application was one made in continuation of the previous application. I would dismiss this appeal with costs.

Jwala Prasad, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 102

ROE AND JWALA PRASAD, JJ.

Tula Singh and others—Defendants—Appellants.

v.

Gopal Singh and another—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1250 of 1914, Decided on 18th May 1916, from a decision of Dist. Judge, Gaya, D/- 27th February 1914.

Evidence Act (1 of 1872), S. 68—S. 68 is imperative—Document which requires to be attested cannot be used in evidence until one such witness is called.

Section 68, Evidence Act, is imperative. So long as there is a witness alive and subject to the process of the Court, no document which requires to be attested can be used in evidence until one such witness has been called. The fact that when called he will prove hostile does not excuse the plaintiff of his duty.

[P 103 C 1]

Chandra Sekhar Prasad Singh—for Appellants.

Rajendra Prasad—for Respondents.

Judgment.—In this case the basis of the plaintiffs' suit is an ijara lease upon which a sum of Rs. 3,500 was advanced and rent reserved Rs. 282. The cause of action was the ejectment of the plaintiffs by the defendants from the property covered by the ijara. The facts found by the lower Court are that the ijara was actually executed, that this consideration passed and that the plaintiffs were ejected by the defendants without repayment of the consideration money. Defendants 1 to 6 are now the vendees of the property covered by the ijara, and they have been sued as the principal delinquents. The lower Courts have decreed the suit. In appeal two grounds are taken. Firstly that inasmuch as the sale of the property was in the names of defendants 4 to 6, and inasmuch as the plaintiffs in a previous litigation sought for a declaration that defendants 4 and 6 were the benamidars of defendants 1, 2, 3 and 5 and failed to prove the benami

character of the sale, it should be held to be res judicata that defendants 1, 2, 3 and 5 have no interest in the property and cannot, therefore be held liable for any decree for costs or mesne profits made. The second ground is that the ijara cannot be used as evidence unless the attesting witness are alive and no attesting witness has been called.

We will deal first with the question of res judicata. It appears that the suit upon which this question of benami was formerly in issue, was a partition suit brought by this plaintiff on the basis of his ijara deed for a separation of the share leased to him in ijara. He obtained a decree for partition and a separate share was formed representing his interest as ijaradar in the property. It is clear that the interest of the defendants was not a matter directly or substantially in issue in that suit. The only matter directly in issue then was 'is the plaintiff entitled to his share?' and nothing else could be regarded as a subject adjudicated. We agree with the lower Court, therefore, in holding that there is no bar by res judicata to the plaintiffs' claim. On the second ground of appeal it is clear that the case must go back to the lower Court. We direct that the evidence be taken of one attesting witness. If he denies that he was an attesting witness, he may be declared hostile and cross-examined, and on the result of his evidence added to the evidence already on the record, the lower Court will find as a fact whether or not the document was attested according to law. S. 68, Evidence Act, is imperative. So long as there is a witness alive and subject to the process of the Court, no document which requires by law to be attested shall be used in evidence until one such witness has been called. The fact that when called he will prove hostile does not excuse the plaintiff of this duty. Let this case stand over as part heard until this evidence has been recorded and the point of attestation further considered. Let the records be returned to this Court not later than 1st August 1916. If the District Judge, after exhausting all the processes of the Court is satisfied that the witness has in fact placed himself in such a position that he is no longer subject to the process of the Court, the District Judge may return the records with a certificate to that effect. Let the re-

cords be sent down at once. (After receipt of the finding of the District Judge on the question of attestation their Lordships delivered the following)

Judgment.—The learned Judge has found upon the issue remitted to him that the document in suit was duly attested. This finding concludes the appeal. It must now be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 103

CHAMIER, C. J. AND SHARFUDDIN, J.

Lalbehary Singh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Ref. No. 31 of 1916. Decided on 31st October 1916, against order of Sessions Judge, Patna.

Criminal P. C. (5 of 1898), S. 195 (b)—Complaint before police followed by one in Court under S. 195 (b)—Proceedings cannot be taken against complainant without sanction for his prosecution.

A, B and C gave information to the police in respect of certain offences committed by X and others. C subsequently petitioned the Sub-Divisional Magistrate against the conduct of the police and prayed for judicial enquiry. The case against X and others was finally withdrawn by the Public Prosecutor, and the police filed a complaint before the Sub-Divisional Magistrate for offences under S. 211, I. P. C., against C and under Ss. 211/109 against A and B in respect of the false complaint before the police:

Held: (1) that as the complaint before the police was followed by one in Court, S. 195 (b), Criminal P., C., applied, and no proceedings could be taken against C without obtaining sanction for his prosecution; (2) that although C alone had petitioned the Magistrate, sanction was required for proceedings against A and B as well, as their informations to the police were given for and in the interests of C, and the charges against them were for the abetment of the offence with which C was charged: 36 I C 857, *Rel. on.* [104 C 1, 2]

M. Yunus and Shiveshwar Dayal—for Petitioners.

Sultan Ahmad—Opposite Party.

FACTS appear from the following letter of reference:

"1. On 11th December 1915 Batao Kahar, one of the petitioners, lodged an information before the police of Bakhtiar-pur to the effect that Sudeshwar Singh, another of the petitioners, had been wounded with a sword and been robbed of Rs. 900 by certain persons. During the police enquiry, a petition was filed by Sudeshwar Singh before the Sub-Divisional Magistrate of Barh stating the substance of the information and com-

plaining against the police. The police reported the case false. The Magistrate held a judicial enquiry and ordered the police to send a charge sheet against the accused. This was done and after an investigation by the Magistrate, the accused were committed to the Court of Session on a charge under S. 397, I. P. C. In the Court of Session the Public Prosecutor, with the consent of the Court, withdrew from the prosecution and the accused were acquitted. A complaint was lodged by the Sub-Inspector of Police of Bakhtiarpur before the Sub-Divisional Magistrate of Barh on 7th August 1916 against the petitioners, charging them with having committed offences punishable under S. 211 and S. 211 read with S. 109, I. P. C. In the written complaint it was stated that the complaint was lodged under the orders of the District Magistrate and the Superintendent of Police. In his sworn statement the complainant said that he had received sanction of the District Magistrate to complain. This term was evidently used loosely, as it is stated by the Additional District Magistrate in an order dated 18th August that there was no order by the District Magistrate sanctioning the prosecution and that the prosecution was based not on any sanction but on police complaint filed in Court. The petitioners complained to the Sub-Divisional Magistrate that the case could not proceed for want of sanction, among other reasons. The Sub-Divisional Magistrate overruled this objection, holding that no sanction was necessary, that the complaint lodged by the Sub-Inspector was sufficient and that the case should proceed.

2. The last-mentioned order by the Sub-Divisional Magistrate of Barh directing that the case should proceed.

3. It is plain on the construction of S. 195 (1) (b), Criminal P. C., that the offence alleged against the petitioners having been committed in relation to a proceeding in Court, the sanction or the complaint of that Court is necessary before cognizance can be taken of the alleged offence under S. 211, I. P. C. The question is concluded by the decision in *F. A. Brown v. Ananda Lall Mallick* (1), which exactly applies to the present case. The proceedings against

the petitioners ought, therefore, to be quashed."

Judgment.—This is a reference by the learned Sessions Judge of Patna, in which he recommends that the proceedings taken against 3 persons for alleged offences under S. 211, I. P. C. should be quashed. The facts are sufficiently set out in the reference and need not be repeated. The only question was whether there was any ground for distinguishing the cases of Batao and Lalbehary from the case of Sudeshwar. It now appears that Batao Kahar's information before the police was given for and in the interests of Sudeshwar, the man who presented a complaint before the Sub-Divisional Officer, and that Lalbehary, the third man, has been prosecuted for abetting the offences committed by the other two. There appears to be no ground on which we could distinguish the present case from the case, *Brown v. Ananda Lall Mallick* (1), relied upon by the Sessions Judge. We, therefore, set aside the proceedings which have been taken against the three men. Let the papers be returned.

V.S./R.K. *Proceedings set aside.*

A. I. R. 1916 Patna 104

JWALA PRASAD, J.

Samundar Singh and others—Defendants—Appellants.

v.

Mukh Lal Singh and others—Plaintiffs—Respondents.

Second Appeal No. 292 of 1916, Decided on 30th November 1916, against the decree of Dist. Judge, Patna, D/- 9th December 1915.

Bengal Tenancy Act (1885), S. 25—Ejectment—Denial of landlord's title must precede institution of suit—Transfer of Property Act (1882) S. 111 (g).

The denial of a landlord's title by a tenant, in order to involve forfeiture of the latter's interest, must be expressed and not implied and must precede the institution of the suit for ejectment on the ground of denial of title. 28: Cal 113, Rel. on. 8 I C 660 and 5 I C 708, Dist. [P 106 C 2]

Ganesh Dutt Singh—for Appellants.

Baidya Nath Narain Sinha—for Respondents.

Judgment.—This appeal arises out of a suit brought by the respondents in the Court of the Munsif of Patna for a declaration of their title to the lands in suit and for possession thereof. The lands in dispute consist of survey plots Nos. 951 and 952. They have been recorded in the

1. (1916) 36 I C 857.

names of the defendants as their mukadammi lands and are admittedly in their possession. The plaintiff's case is that the said lands in dispute form part of a 7 bighas mukadammi land purchased by them under a sale certificate dated 7th August 1872, and that the said plots Nos. 951 and 952 along with two other plots bearing Nos. 788 and 950 are held by the defendants as tenants of the plaintiffs at an annual rent of Rs. 9. The defendants, on the other hand, contend that the lands in suit form part of their own mukadammi land of 5 bighas and they dispute the title of the plaintiffs to the said lands. The Survey Record of Rights have recorded the names of the defendants as the mukadammidars of the lands in suit. The plaintiffs, therefore, brought this suit for the following reliefs: (1) That it be declared that the lands in plots Nos. 951 and 952 belong to the plaintiffs as mukadammidars of the said lands; (2) That it be declared that the said lands do not form part of the mukadammi lands of the defendants and that the survey entry in respect of the same in favour of the defendants is wrong; and (3) On a declaration of the title of the plaintiffs over the land in suit as mukadammidars thereof, the plaintiffs be awarded khas possession of the said lands. The defendants by their written statement deny the title of the plaintiffs as mukadammidars of the land and assert that they do not hold the lands at a rental of Rs. 9, but that they hold only .54 (decimal) at a rental of Rs. 4 under the plaintiffs.

Both the Court below have held that the lands in suit form part of the 7 bighas purchased by the plaintiffs at a Civil Court sale in 1872, in respect of which the sale certificate has been produced by the plaintiffs-respondents. The Courts below have also held that the plaintiffs succeeded in this case in proving their title and in rebutting the presumption raised by the Record of Rights in favour of the defendants. On the basis of these findings the Courts below have given a decree in favour of the plaintiffs in respect of the lands in suit and have further directed that the possession over the lands be given to them by ejecting the defendants therefrom. The defendants have appealed to this Court. It is contended on their behalf that the findings of the Courts below are not

sufficient in law to rebut the presumption afforded by the Record of Rights and that the sale certificate in itself is no evidence of title of the plaintiffs. No doubt the Courts below have not referred to the evidence in this case but they have sufficiently indicated in their judgments, particularly the appellate Court, that there was sufficient material on the record to justify them to come to the conclusion that the plaintiffs proved their case satisfactorily and discharged the onus that was upon them of rebutting the presumption of the Record of Rights.

With a view to satisfy myself as to the correctness of the finding, I have looked into the evidence on the record and find that there is abundant evidence of witnesses of the neighbouring lands as well as of the cosharers in the village to prove the title of the plaintiffs in these lands. They prove that these lands are part of lands purchased by the plaintiffs at the auction-sale in 1872 and that the plaintiffs had been in possession thereof as mukadammidars and the defendants were mere tenants on the said lands and were paying a rent of Rs. 9 to the plaintiffs. I have no doubt that the Courts below had sufficient material before them to come to the finding of fact that the plaintiffs' title over these lands has been proved and that the entry in the Record of Rights was wrong. The Courts below were therefore right in giving a declaration to the plaintiffs of their title over these lands and for possession as mukadammidars over these lands. The Courts below have, however, given a decree for ejectment of the defendants and for khas possession to the plaintiffs in this case. The order for ejectment is contained in the concluding portion of the judgment of the District Judge, which runs as follows:

"I thus agree with the Munsif's finding of fact in issue 1 and in giving the plaintiffs a decree for ejectment, he was only giving them what they are legally entitled to, seeing that the defendants denied their title."

The order for ejectment has, therefore, been obviously based upon the denial by the defendants of the plaintiffs' title. I have very great doubts as to the correctness of this portion of the order of the Court below. Under S. 25, Ben. Ten. Act, a tenant cannot be ejected from his holding except in execution of a decree for ejectment passed on the grounds specified in that section. These grounds are: (a)

That the tenant has used the land comprising the holding in a manner which renders it unfit for purposes of the tenancy. (b) That he has broken the condition consistent with the provisions of this Act and on breach of which he is under the terms of the contract between himself and his landlord liable to be ejected. It is thus clear that the denial by a tenant of his landlord's title is no ground for forfeiture of his tenancy under the Bengal Tenancy Act. No doubt under S. 111 (g), T. P. Act based upon the English law, a denial of the landlord's title is a ground for forfeiture of the tenant's interest. The introduction of S. 136-A by Act of 1907 B. C. into the Bengal Tenancy Act will also show that the landlord is entitled only to damages for the denial of his title by his tenant but is not entitled to eject the tenant on account of such a denial. The learned vakil for the respondents has referred to a series of rulings on this point, particularly the rulings reported as *Ekabar Sheikh v. Hara Bewah* (1) and *Sheikh Miadhar v. Rajani Kanta Ray* (2). A reference to these authorities will show that they do not bear out the contention of the learned vakil for the respondents. In *Ekabar Sheikh v. Hara Bewah* (1) in a previous suit on the plea of the tenant-defendant it had already been held that there was no relationship of landlord and tenant between the plaintiff and the defendant, and hence in the subsequent suit for ejectment by the landlord it was held that the plaintiff had forfeited his rights in the tenancy by reason, not of the denial of the landlord's title but by an adjudication by a Court of Justice in a previous suit which operated as res judicata. The same appears to be the principal of the decision in *Sheikh Miadhar v. Rajani Kanta Ray* (2).

The tenant had succeeded in a previous suit in resisting the claim of the landlord for rent by setting up title in himself and denying the title of the landlord. It was rightly held that in a subsequent suit for ejectment the decision in the former suit precluded him from again asserting his right as tenant of the plaintiff. It is thus clear that a mere denial of the landlord's title in the suit itself will not entail a forfeiture of the tenancy. In this case the plaintiff has admitted throughout in

the plaint and in the evidence that the defendants hold these lands as tenants up to the present moment on payment of certain rent. The defendants have set up a title in themselves of mukadammidars. There is nothing on the record to show beyond the entry in the Survey Record of Rights that the defendants had denied expressly the title of the plaintiffs as landlords previous to the institution of this suit and following the decision in *Harish Chandra Shaha v. Chandra Mohan Dass* (3), I hold that the denial of the landlord's title must be expressed and not implied and that such a denial must precede the institution of the suit for ejectment on the ground of denial of the landlord's title. Several other authorities have been cited in this case, but they are all authorities of a time prior to 1907 when the Bengal Tenancy Act was amended and S. 136 A was added to it, and I do not think that they apply to this case nor do I think that they go far enough to hold that the denial in the same suit either in the written statement or in the evidence is a denial that will cause forfeiture of the tenant's interest. I therefore hold that the plaintiffs in this case are not entitled to get khas possession over the lands in suit by ejecting the defendants from the same and I modify the order and decree of the Court below to that extent.

The plaintiffs will therefore be entitled to a declaration of their title over the lands as mukadammidars and will get possession over these lands of their proprietary interest, but shall not be entitled to eject the defendants who are tenants of the land. The plaintiffs are entitled to get rent only from them. With the above modifications I affirm the decree of the Court below. The appeal is therefore partly decreed with proportionate costs.

V.S./R.K.

Decree modified.

3. (1901) 28 Cal 113.

A. I. R. 1916 Patna 106

CHAMIER, C. J. AND SHARFUDDIN, J.
Mahomed Mahboob—Appellant.

v.

Bhagoo Mahto—Respondent.

Second Appeal No. 2769 of 1914, Decided on 19th December 1916, against decree of Sub-Judge, Mozaff pore, D/- 8th June 1914.

1. (1910) 8 I C 660.

2. (1910) 5 I C 708.

Landlord and Tenant—Decree in suit for rent against some joint tenants is not rent decree and auction purchaser is entitled only to right, title and interest of judgment-debtors.

Where all the persons entitled to a holding are not made parties to a suit for recovery of rent, the decree obtained in such a suit is not a 'rent-decree' and the auction-purchaser in execution of such a decree would at the most be entitled only to the right, title and interest of the judgment-debtors. [P 107 C 2]

Mustafa Khan—for Appellant.

Baidyanath Narain Sinha—for Respondent.

Chamier, C. J.—It appears that an occupancy holding which consisted of 6 bighas odd was the property of three persons, Chethru, Palukdhari and Dhanukdhari. Chethru was the nephew of Palukdhari and Dhanukdhari was some kind of cousin of Chethru and Palukdhari. The appellants in this case who are the 16-annas proprietors of the village in which the holding lies, brought a suit for rent in 1904 and obtained a decree in 1906. In the same year the defendants 1st party who appear to have purchased the interest of Dhanukdhari in the holding, paid the entire decree money into Court under S. 171, Ben. Ten. Act, and subsequently obtained possession of the entire holding. Some years later the appellants brought another suit for rent in respect of this holding and obtained a decree in July 1908, in execution of which they claim to have bought a holding for Rs. 217. On attempting to take possession the appellants were obstructed by respondents 1st party and brought the present suit in September 1912. The Courts below have agreed in dismissing the suit. It is quite clear that the appellants brought this suit claiming that they had purchased the holding in execution of a rent-decree and were therefore entitled to disregard the rights of respondents 1st party altogether. Both Courts below have held that the decree was not what is called a rent decree and therefore the appellants must be taken to have purchased only the rights of the defendants to the second rent suit. The defendants to that suit were the two sons of Chethru, one of whom was at the time minor. Palukdhari was dead at the time of that suit and had left no heirs. Dhanukdhari had died but had left a widow and daughters. The appellant did not implead the widow and daughters of Dhanukdhari as defendants to the second rent suit. On that ground the lower appellate Court has held that the

decree was not what is called a rent-decree and therefore the holding did not pass to the appellants at the auction-sale free of encumbrances. The lower appellate Court also held that the decree was bad in consequence of the failure of the appellants to have a guardian appointed for Ram Saran, one of the defendants who was a minor.

It is unnecessary for us to go into the question whether the purchase at auction is rendered invalid by reason of the fact that no guardian was appointed to represent Ram Saran in the suit, for it is clear that on the findings recorded by the lower appellate Court the heirs of Dhanukdhari were not parties to the suit. Therefore all the persons entitled to the holding were not parties to the suit and the appellants must be taken to have purchased at most only the right of two sons of Chethru. It seems to follow that the appellants are not entitled to a decree for possession against the respondents 1st party. But it is contended that Dhanukdhari, Palukdhari and Chethru were all joint in estate and therefore the widow and daughters of Dhanukdhari took no interest in the holding. No such case as this was put forward in either of the Courts below and it is impossible for us in second appeal to presume that all three were joint in estate. I observe moreover that one of the witnesses called by the appellants at the trial who spoke to the relationship between the three persons was extremely vague about it. It is impossible to ascertain exactly what relationship there was between Dhanukdhari and Palukdhari. It appears to me that the appellants must be taken to have acquired only the interests of the two sons of Chethru. The case as brought by the appellants has failed. In my opinion on the facts as found the decision of the lower appellate Court is correct, and I would dismiss this appeal with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 107

ROE AND JWALA PRASAD, JJ.

Kashi Nath Ray—Appellant.

v.

Raja Durga Prasad Singh—Respondent.

First Appeals Nos. 169/1, 196/2, 196/3, and 169/4 of 1911, Decided on 2nd November 1916.

(a) **Contract Act (1872), S. 16—Undue-influence — Presumption of—Unconscionable agreement between tenant and malik.** presumption is that malik exercised undue-influence.

Where a harsh unconscionable bargain is entered into by a tenant for no apparent reason at all the Court is justified in presuming that undue influence was brought to bear upon him by the malik, who undoubtedly stands in a position from which undue influence can be exercised.

[P 108 C 2]

(b) **Landlord and Tenant—Tenant in possession of land adjacent to his holding, under his cultivation for many years past and paying rent to the zamindar, presumption is that adjacent land belongs to tenant—Evidence Act, S. 114.**

Where a tenant is found in possession of land adjacent to other lands admittedly under his cultivation, and where it is shown that for the whole area of land held by him he pays rent to the zamindar and has for years cultivated the land acquired without objection from the zamindar's servants, that land must, until the contrary is proved, be presumed to be a part of his holding: 12 C L R 457 and 3 C W N 763, *Appr.* 11 I C 696 and A I R 1914 Cal 638 *Ref.*

[P 108 C 2]

Naresh Chandra Sinha—for Appellant.

Sisir Kumar Mitter—for Respondent.

Judgment.—Four appeals have been filed against the judgment in this case which arises from land acquisition proceedings in the District of Manbhum. The contesting parties are the landlords and tenants of the village and the point in contest is the proportion in which the compensation awarded by the Deputy Collector shall be allotted to the landlords and tenants respectively. The Deputy Collector assessed the tenants' rights at sums varying from Rs. 5 to Rs. 50 for the various classes of lands in the village and awarded the landlords only 20 years' compensation upon the rent annually payable for each class of land. The landlords appeal against this and claim in the first instance the whole of the tenants' compensation on the ground that the kabulayat executed by the respondents was to the effect that they would make over to the landlords any sums paid to them in the event of lands being acquired by Government or in the alternative half the share of the said compensation on general grounds of equity. As a second part of the appeals it has been put forward that the burden of proof was on the tenant to show that each plot of land acquired was part of his tenancy and that failing such proof the whole compensation should be given to the landlord. With regard to

the kabuliyats we would say only that where a harsh unconscionable bargain is entered into by the tenant for no apparent reason at all the Court is justified in presuming that undue influence was brought to bear upon him by the malik who undoubtedly stands in a position from which such undue influence can be exercised. The learned vakil for the appellant has wisely made no attempt to show that the tenants acted of their own free will in allowing so monstrous a clause to be inserted in the kabuliyats. We, therefore, hold that the lower Court rightly refused to take cognizance of the bargain. With regard to the suggestion that in equity the landlord is entitled to half the compensation paid to the tenant, we have only to say that the learned Deputy Collector in separately assessing the landlord's rights and the tenant's rights, must be presumed to have taken an equitable view of the annual profits of each class of right.

In the second part of the appeals we have considered the recent decision of *Gopini Debi v. Lokenath Tewari* (1) and *Protap Chandra Roy v. Judhister Das* (2). Therein it is indicated that these decisions were applicable only to the particular circumstances of the particular cases. We still prefer the old rulings of *Rhidoy Kristo Mistri v. Nobin Chunder Sen* (3) and *Rajendra Kumar Bose v. Mohim Chandra Ghose* (4) in the circumstances of the case now before us. Where a tenant is found in possession of land adjacent to other lands admittedly under his cultivation and where it is shown that for the whole area of land held by the tenants he pays rent to the zamindar and has for years cultivated the land acquired without objection from the zamindar's servants, that land must, until the contrary is proved, be presumed to be a part of his holding. We are, therefore, of opinion that the learned Judge has rightly dealt with the matter before him. The appeals are dismissed with costs.

V.S./R.K.

Appeals dismissed.

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1. (1911) 11 I O 696.
 2. A I R 1914 Cal 638=23 I O 69.
 3. (1888) 12 C L R 457.
 4. (1899) 3 C W N 763.
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A. I. R. 1916 Patna 109 (1)

ROE AND JWALA PRASAD, JJ.

Bharat Mahto and others—Plaintiffs—Petitioners.

v.

Nisarali Sheikh and others—Defendants—Opposite parties.

Civil Rule No. 1206 of 1915, Decided on 22nd May 1916, against decision of Sub-Judge., Manbhum, D/- 17th September 1915.

Provincial Small Cause Courts Act (1887), S. 25—Suit for two alternative reliefs—One not cognizable but on its face unawardable—Plaint should be ordered to be amended—Civil P. C. (1908), O. 6, R. 17.

Where a plaintiff asks for two alternative reliefs in the Small Cause Court, one of them not being cognizable by that Court, but on the face of it a relief which cannot be given in law, the proper course is to direct that the plaint be amended by striking out the clause demanding that relief.

[P 109 C 2]

Sishar Kumar Mitra—for Petitioners.*Abani Bhusan Mukerji*—for Opposite Parties.

Judgment.—The facts of this case briefly are that the applicants before us were mortgagee, and the opposite party mortgagors under a deed securing the sum of Rs. 200 to the applicants. In Bysack 1321 a contract was entered into whereby in consideration of the making of an endorsement on the back of the mortgage-deed crediting Rs. 215 to the mortgagors' account under that deed, a number of cattle, bullocks and buffaloes should be handed over to the mortgagees. The mortgagors having failed to carry out their part of the contract, the mortgagees, instituted a suit in the Court of Small Causes praying in the alternative for delivery to them of the cattle, or for damages to the extent of Rs. 215 and interest for their non-delivery. The learned Subordinate Judge was of opinion that the suit was in essence a suit for recovery of money due on the mortgage-debt; he, therefore, dismissed the plaintiffs' suit and ordered the defendants to pay the plaintiffs' costs. The matter now comes before us under S. 25, Small Cause Court Act, at the instance of the mortgagee plaintiffs. It seems to us that the position throughout has been misconceived.

The suit is in effect a suit upon a contract. The consideration on one side was the writing of certain words upon a piece of paper. That part of the contract has been performed by the plaintiffs. It is, therefore necessary that the defendants

should perform their part of the contract, or pay damages for its breach. Unless there is something remarkable about the bullocks and buffaloes, it is obvious that adequate compensation for the breach of the contract can be given on money.

Therefore under the Specific Relief Act, S. 12, no suit for specific performance would lie.

But the plaintiffs have asked for that specific performance, and under S. 15, Sch. 2, Provincial Small Cause Courts Act, Cl. 15, a suit for specific performance is not cognizable by a Small Cause Court.

The question before us is, the plaintiffs having asked for two reliefs in the alternative in the Small Cause Court, and one of these reliefs not being cognizable by that Court but on the face of it a relief which cannot be given in the law, what action the Small Cause Court should have taken with regard to the plaint. We are of opinion that in the exercise of the discretion vested in us under S. 25, substantial justice will be done if we direct that the plaint be amended by the striking out of the clause or clauses demanding specific performance of the contract. The suit will then be dealt with solely as a suit for damages occasioned by a breach of the contract.

Let the learned Subordinate Judge be directed to assess those damages and to make a decree accordingly. In view of the mismanagement of this case by the plaintiffs' legal advisers, we think it fair that they should pay the costs of the hearing of this Rule, hearing-fee one gold mohur. The costs of the Small Cause Court will, of course, follow the result of the action.

v.S./R.K.

*Rule made absolute.***A. I. R. 1916 Patna 109 (2)**

CHAMIER, C. J. AND ROE, J.

Bijoo Singh and another—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 359 of 1916, Decided on 6th December 1916, against the order of Dist., Judge, Muzaffarpur, dated 31st October 1916.

Criminal P. C. (1898), Ss. 259 and 403—Complainant absent on day of hearing—Accused discharged—Second complaint on same facts can be entertained.

Where an accused has already been discharged under S. 259 of the Criminal Procedure Code, a Magistrate has jurisdiction to entertain a second

complaint against him based on the same facts: 28 Cal 652 and 29 Cal 726, *Rel. on.* [P 110 C 2]

Gour Chandra Pal—for Applicants.

Sultan Ahmad—for the Crown.

Chamier, C. J.—In this case a complaint was filed before a Sub-Deputy Magistrate. The complainant was examined and the accused were summoned. On a later date some evidence was taken, and the case was adjourned. On the next date fixed for hearing the complainant was absent and the Magistrate thereupon discharged the accused. A few days later the complainant filed a fresh complaint in the Court of the Sub-Divisional Magistrate, saying that he had been absent on the day on which the accused had been discharged because he understood that the Court had been closed on account of the flood. The Sub-Divisional Magistrate examined the complaint and issued process. It is contended that the Sub-Divisional Magistrate had no jurisdiction to entertain the complaint, inasmuch as the order of discharge passed by the Sub-Deputy Magistrate had not been set aside by any superior authority. It is conceded that there is nothing in the Code to prevent a Magistrate from taking up a second complaint in circumstances like those of the present case, but it is said that if procedure of this kind is permitted accused persons will be subjected to great harassment. In my opinion the question has been settled by the decisions of two Full Benches of the Calcutta High Court: *Dwarka Nath Mondal v. Beni Madhab Banerji* (1) and *Mir Ahmed Hossein v. Mahomed Askari* (2). In the former case the Chief Presidency Magistrate entertained a complaint after a previous complaint made by the same persons had been heard by a Bench of Presidency Magistrates and an order had been passed discharging the accused. The Calcutta High Court held that the Chief Presidency Magistrate had jurisdiction to entertain the second complaint. In the latter case a Magistrate in the mufassil, after passing an order of discharge in consequence of the absence of the complainant, entertained a fresh complaint and it was held that he had jurisdiction to do so. The judgments show that in the opinion of the Bench there was no ground for distinguishing between the case of a Presidency Magistrate and that of any other Magis-

trate. That being so, the decisions in the two cases referred to in my opinion cover the present case. Apart from those decisions I would hold that as there is nothing in the Code to prevent a Magistrate from entertaining a second complaint after an order of discharge by another Magistrate, he has jurisdiction to do so. In my opinion this application should be dismissed.

Roe, J.—I agree. Under S. 190 the Magistrate had power to take cognizance of the second complaint. Under S. 200 he was required to proceed in a particular manner and S. 403 is not a bar to his proceeding under S. 200.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 110

SHARFUDDIN AND ROE, JJ.

Bishen Narain Das Poddar and others
—Appellants.

v.

Chandra Kanta Naik and another—
Respondents.

Second Appeal No. 3835 of 1912, Decided on 14th June 1916, against decree of Dist. Judge, Manbhum, D/- 2nd September 1912.

Bengal Rent Act (1859), S. 82—Eviction of raiyat—Under-raiyat is liable to ejectment and is not entitled to question decree of ejectment against raiyat for non-payment of rent—Chota Nagpur Tenancy Act (1908).

After an occupancy tenant has been ejected from a holding for non-payment of rent, his under-raiyat is a mere trespasser, and is liable to ejectment at the instance of the landlord.

An under-raiyat has no locus standi to question the validity of a decree of ejectment passed against the occupancy tenant. [P 111 C 2]

Naresh Chandra Sinha—for Appellants.

Hasan Imam and Lal Mohan Ganguli
—for Respondents.

Roe, J.—In this case the appellant is a cultivator of the District of Manbhum, who, prior to the passing of the Chota Nagpur Tenancy Act, was an under-raiyat in an occupancy holding from which the occupancy raiyat had been evicted for failure to pay rent. He retained possession after the decree against the occupancy raiyat and also after the execution of that decree by delivery of possession to the decree-holder. That decree was obtained on 6th April 1908, and possession was delivered on 8th June 1908 and the present suit instituted on 3rd July 1911. The Chota Nagpur Tenancy Act was extended to the locality in which

1. (1901) 28 Cal 652.

2. (1902) 29 Cal 726.

this holding is situate in the year 1909. The proceedings before us, therefore, prior to the present suit, were under the Rent Act 10 of 1859, and the present suit itself is to be considered in the light of the Chota Nagpur Tenancy Act. The plaintiff claims to evict the defendant as a trespasser. To be on the safe side he also issued a notice upon him to quit, but as he states in his plaint he is confident that any such notice was unnecessary. The defendant put up three defences. First, that he is a tenant and that, therefore, under the Chota Nagpur Tenancy Act he is not liable to eviction by any civil Court save that of the Deputy Commissioner of Manbhum. Secondly, that he is an under-raiyat and that the interest of an under-raiyat is an incumbrance upon the holding not void but only voidable and that his under-tenancy has never been avoided in the manner contemplated by the Rent Act; and thirdly, if he is to be regarded as a trespasser he has a right to enter into a contest upon the validity of the decree made against the occupancy raiyat for ejectment for failure to pay rent. Practically, therefore, we have to consider only one question in this case and that is whether the defendant was a trespasser or a tenant. If his interest was an incumbrance obviously he was a tenant; if he was a tenant no suit against him would lie; if he is a trespasser action may be taken against him in the ordinary civil Court.

The lower Courts have concurred in finding that he is a trespasser. After full consideration of this question we feel that we must agree with the conclusions arrived at by the lower Courts. We have searched the Weekly Reporter for any expression of opinion in respect to the status of an under-raiyat in the case of an occupancy holding from which a raiyat has been evicted for non-payment of rent. There is ample justification for the proposition that where a holding of an occupancy raiyat is sold, the interest of an under-raiyat is not void but voidable. But there is no case of an under-raiyat's status being recognised in a case in which the occupancy holding is entirely destroyed under the old Rent law. S. 82 seems to us to completely decide the question by its direction that when a decree is for eviction, the decree-holder shall be put in actual physical possession of the land. There is a clear distinction

between proceedings in regard to a tenure-holder and proceedings in regard to a raiyat. Where the proceeding has been with regard to a tenure-holder or under-tenant the decree is to take the form of an order to all raiyats to pay rent to the decree-holder, and it seems to us that it is impossible to say that the decree holder can be put into actual physical possession of the land, unless indeed it be conceded that the under-raiyat is completely ignored and treated as having no locus standi. The remaining point for decision is whether the under-raiyat can, in the proceedings now before us, contest the validity of the decree against his lessor. His lessor was Rajendra Chowdhury and he obtained the holding by a sale for arrears of rent. It is clearly set out in Act 10 of 1859 that a sale for arrears of rent can only take place in the case of an interest which is transferable. It is clearly laid down that a decree for ejectment can be made in a case in which the holding is not transferable.

Therefore, Mr. Naresh Chandra Sinha argues that the decrees are contradictory in terms; one or other of them must be wrong, and he contends that it was open to his client to come forward and contest the second decree. Here again it is clear that the under-raiyat could not contest the validity of that decree in this suit as defendant, unless he had a locus standi to contest the validity thereof in a separate suit in which he would have been the plaintiff. We can find nothing whatever in any part of Act 10 of 1859 which could give an under-raiyat a locus standi to institute such a suit or proceeding as plaintiff. He might perhaps have maintained a suit for a declaration that the decree was fraudulently obtained and, therefore, a nullity. But he had no locus standi to have it declared that it was contrary to law. Therefore, he cannot put forward the illegality of that decree as a defence to a suit in which it is sought to declare him a trespasser. In these circumstances we feel the decision of the lower Court is correct and that the appeal must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 112 (1)

CHAMIER, C. J. AND SHARFUDDIN, J.

Radha Kishun—Plaintiff—Appellant.

v.

Bhagwan Prasad and others—Defendants—Respondents.

Second Appeals Nos. 2564 and 2761 of 1914, Decided on 21st December 1916, against the decree of Sub-Judge, Muzaffarpore, D/- 13th June 1914.

Landlord and Tenant—Ejectment—Transfers of parts of occupancy holdings—Partition between maliks—One malik becoming proprietor of entire holding cannot eject transferees.

Where parts of occupancy holdings are transferred, and by a subsequent partition between the maliks one of the holdings transferred is allotted to the patti of one of them, the latter is not entitled to treat the transfers as a transfer of the entire holding and thus eject the transferees: *A. I. R. 1915 Cal. 242* and *4 I. C. 740 Ref.*

Kulwant Sahai and *Rajendra Prasad*—for Appellant.

Abani Bhushan Mukerji—for Respondents.

Chamier, C. J.—These are appeals by the plaintiff in two suits. In one he claimed possession of two entire occupancy holdings and parts of six occupancy holdings. In the other he claimed possession of part of one occupancy holding. The facts are that one Uttim Sahai held an 8 annas share in the village. The defendant held a 2 annas share and took a lease of Uttim's holding for a term which expired in 1910. Before 1910, the plaintiff purchased the holdings or parts of holdings now in suit. There was a partition of the village in 1910, by which the two entire holdings and the parts of the seven holdings purchased by the plaintiff were allotted to the plaintiff's patti. The defendant's case is that all the purchases were approved by the landlords when they were made and cannot now be challenged by the plaintiff. Defendant says, and it is so found, that the owners of 6 annas approved of the transfer as far as their shares were concerned and that he as thekadar of Uttim's 8 annas share approved of the transfers as regards that share. He held the remaining 2 annas himself. I think it is unnecessary to decide whether defendant as thekadar could approve of the transfers on behalf of Uttim. According to the Full Bench decision in *Dayamoyi v. Ananda Mohan Roy* (1), the transfers

1. *A I R 1915 Cal 242=24 Cal 172=27 I C 61.*

did not entitle any of the landlords to claim possession so far as they related to parts only of holdings, and it seems impossible to hold that the subsequent partition between the maliks gave the plaintiff a right to treat the transfers of parts of holdings as transfers of entire holdings merely because those parts were allotted to his patti at the partition. As regards the parts of holdings I think it is clear that the suit was rightly dismissed. As regards the two entire holdings this case is not distinguishable from that of *Hossein Mahomed v. Fakir Mahomed* (2), I would dismiss both appeals with costs.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeals dismissed.*

2. (1909) 4 I C 740.

A. I. R. 1916 Patna 112 (2)

JWALA PRASAD, J.

Ajodhya Prasad Singh—Appellant.

v.

Jagdeo Singh and others—Respondents.

Second Appeals Nos. 3932 to 3934 of 1913, Decided on 12th December 1916, against decree of Dist. Judge, Darbhanga, D/- 19th September 1913.

Bengal Tenancy Act (1885), S. 87—Usufructuary mortgage with possession does not amount to abandonment.

Mere execution of a usufructuary mortgage and delivery of possession to the mortgagee of his holding by a tenant who continues to reside in the village, does not entail forfeiture of the tenancy nor does it amount to an abandonment of the holding within the meaning of S. 87: 40 *Cal 870 Ref.* [P 113 C 1]

Ganesh Dutta Singh—for Appellant.

Chandra Sekhar Banerji—for Respondents.

Judgment.—The appellant in this case is landlord of village Mathi, Perganah Saresa. Defendant 1 took a usufructuary mortgage from defendant 2, of his raiyati right in certain lands held by defendant 2, in village Mathi. This mortgage-bond was executed on the 13th September 1901, and defendant 1 is in possession of the lands from that time. The plaintiff has brought this suit for a declaration that the original tenant of the lands, defendant 2, has abandoned his holding, by reason of his having executed the usufructuary bond in favour of defendant 1, and having parted with the possession of the holding. There is a prayer for recovery of possession also. The lower appellate Court has held that the original tenant still

resides in the village and that the transfer by usufructuary mortgage was only a partial transfer of the right of the original tenant. The lower appellate Court, therefore, has come to the conclusion that the execution of the mortgage-bond and the possession delivered under that to defendant 1, does not amount to an abandonment under S. 87, Ben. Ten. Act. There is no suggestion in the plaint that the original tenant abandoned his residence. The suit is not based upon that ground and I agree with the views of the lower appellate Court that all the conditions required by S. 84 have not been fulfilled in the case. It has been held over and over that mere execution of a usufructuary mortgage by a tenant and the delivery of possession to the mortgagee does not entail forfeiture of the tenancy nor abandonment of the holding vide *Bhupendra Nath Bose v. Bansi Tanti* (1) where all the authorities on the point have been referred to. I therefore hold that there is no abandonment under S. 87, and agree with the views of the lower appellate Court and dismiss the appeal with costs.

V.S./R.K. *Appeal dismissed.*

1. (1913) 49 Cal 870=22 I C 416.

A. I. R. 1916 Patna 113

CHAMIER, C. J. AND ROE, J.

Jagernath Singh and others—Judgment-debtors—Appellants.

v.

Mt. Mohra Kuvar—Respondent.

Appeal No. 210 of 1916, Decided on 22nd December 1916, from appellate order of District Judge, Saran, D/- 8th May 1916.

(a) Civil P. C. (1908), O. 34, Rr. 1 and 12—Puisne mortgagee can sell mortgaged property subject to prior mortgage.

A puisne mortgagee is not bound to make a prior mortgagee a party to his suit and is entitled to bring to sale the mortgaged property without redeeming the prior mortgage: 13 All 432; 26 All 14 and 30 Bom 156, *Diss from*; 22 Cal 33 and 29 All 385, *Ref.* [P 114 C 1]

A puisne mortgagee is entitled to bring the mortgaged property to sell subject to a prior mortgage held by a third person or by himself at all events where he is unable to sue upon the prior mortgage: 31 Mad 530, *Rel. on*; 30 Mad 408, *Ref.* [P 114 C 1]

(b) Civil P. C. (1908), S. 11, Expl. 4—Puisne mortgagee is not estopped from having prior mortgage mentioned in sale proclamation.

A puisne mortgagee obtained a decree upon his mortgage without mentioning in the plaint that he held a prior usufructuary mortgage on the property;

Held: that he was not estopped from having his prior mortgage notified in the sale proclamation: 24 All 429 (P C); 6 All 269 (P C); 7 All 102 (P C) and 8 Cal 51 (P C), *Dist.* [P 115 C 1]

Rajendra Prasad—for Appellants.

Kulwant Sahay and Shiveswar Dayal—for Respondent.

Chamier, C. J.—In 1904 the respondent brought a suit against the appellants and their father, since deceased, upon a simple mortgage executed by the father alone and in 1905 obtained a conditional decree for sale of the mortgaged property. In 1910 the decree was made absolute. In 1915 the respondent applied for sale of the mortgaged property and asked the Court to notify in the sale proclamation that the property was subject to a prior usufructuary mortgage held by him. The appellants objected (1) that as the decree absolute was passed more than three years after the conditional decree it was incapable of execution and (2) that the property could not be sold subject to the prior mortgage held by the respondent. The Courts below have overruled both objections. On the first objection it is sufficient to say that no appeal was filed against the final decree and the Court executing the decree cannot go behind it. The decree must be taken to have been duly made. The second objection raises a question which in one form or another has been the subject of several decisions. In the well-known case of *Muta Din Kasodhan v. Kazim Husain* (1), a Full Bench of the Allahabad High Court (Mahmud, J., dissenting) held that a puisne mortgagee is not entitled to bring mortgaged property to sale subject to a prior mortgage but must make the prior mortgagee a party and redeem him before bringing the property to sale. That ruling was followed and applied in many cases in Allahabad.

The decision in *Bhagwan Das v. Bhawani* (2) on which the appellants rely, that the holder of a simple mortgage is not entitled to bring the mortgaged property to sale subject to his own prior and usufructuary mortgage, was a necessary corollary of the decision of the Full Bench. To the same effect is the decision of Russell and Batty, JJ., in *Keshavram Dulvaram v. Ranchhod Fakira* (3), where the decision of the Full Bench of the Allahabad High Court was cited,

1. (1891) 13 All 432.
2. (1904) 26 All 14.
3. (1906) 30 Bom 156.

though other reasons also were given for the dismissal of the suit. The decision in *Muta Din Kasedhan v. Kazim Husain* (1) never secured the approval of the legal profession and was the subject of adverse comment in other Courts. [See for example, *Kanti Ram v. Kutubuddin Mahomed* (4)]. For practical purposes the decision was overruled by a Full Bench of six Judges in *Ram Shankar Lal v. Ganesh Prasad* (5) and the legislature has now by O. 34, R. 1, made it clear that a puisne mortgagee is not bound to make a prior mortgagee a party to his suit and is entitled to bring to sale mortgaged property without redeeming the prior mortgage. The Madras High Court took that view in several cases and in *Radhakrishna Iyer v. Muthusawmy Sholagan* (6) they held that the holder of a simple mortgage is entitled to bring the property to sale subject to his own prior usufructuary mortgage. In cases to which S. 57, T. P. Act, applies the Court may order that the property shall be sold free of encumbrances for the discharge of which provision has been made, and under O. 34, R. 12, the Court may with the consent of a prior mortgagee order that the property shall be sold free from the prior mortgage giving the prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. There is also authority for the proposition that a Court in India may, in cases not covered by those provisions, direct the discharge of a prior encumbrance out of the proceeds of the execution sale where the equities of the case require it: See the case of *Rengasami Nandan v. Subbaroya Iyen* (7). It is now clear that a puisne mortgagee is entitled to bring the mortgaged property to sale subject to the prior mortgage of another person, and I see no reason why he should not bring it to sale subject to a prior mortgage held by himself, at all events where he is unable to sue upon the prior mortgage as is the case here.

It has been held that a person holding two mortgages on the same property is not bound to put both mortgages in suit together. In practice he usually sues upon both mortgages, for he cannot bring the property to sale subject to a later

mortgage than the one in suit, whether the later mortgage is held by himself or by any one else, and there is not generally much to be gained by bringing property to sale subject to a prior mortgage held by the decree-holder himself. In my opinion the respondent in the present case was entitled to sue for sale of the property subject to her prior usufructuary mortgage. The next question is whether she is entitled to have the property sold subject to prior mortgage, although she did not mention the prior mortgage in her plaint. If in a suit by a puisne mortgagee for sale of property mortgaged to him a prior mortgagee is impleaded and does not set up his mortgage and the property is sold at auction, without any notification of the prior mortgage, to a person who has no notice of the prior mortgage, the prior mortgagee is not entitled to set up his mortgage against the purchaser: See *Sri Gopal v. Pirthi Singh* (8), where it was held that a subsequent suit on his mortgage by the prior mortgagee was barred by Explan. 2, S. 13, Civil P. C., 1882 (Explan. 4, S. 11 of the Code of 1908).

It is contended that although those sections do not apply to the present case, the principle on which that decision rests applies to the case of a person suing on puisne mortgage who does not mention in his pleadings a prior mortgage held by him but sets it up at a later stage of the suit, and it is argued that the Court has in the present case decided that there shall be a sale of the property free from encumbrances and has made a decree accordingly, and that that decision is binding on the parties in all subsequent proceedings in the suit. It has, no doubt, been laid down in several well-known cases that a decision in a suit is upon general principles binding upon the parties in all subsequent proceedings in the same suit: See *Ram Kirpal v. Rup Kuari* (9), *Beni Ram v. Nanhul Mal* (10), *Mungul Pershad Dichit v. Grija Kant Lahiri* (11). But it was impossible for the respondent to make any claim upon her prior mortgage in the present case, for it was an usufructuary mortgage. She might, no doubt, have mentioned it in the plaint and have asked for sale of the property

4. (1895) 22 Cal 33.

5. (1907) 29 All 385.

6. (1908) 31 Mad 530.

7. (1907) 30 Mad 408.

8. (1902) 24 All 429=29 I A 118 (P C).

9. (1884) 6 All 269=11 I A 37 (P C).

10. (1885) 7 All 102=11 I A 181 (P C).

11. (1882) 8 Cal 51=8 I A 123 (P C).

subject to that mortgage or possibly that that mortgage should be discharged out of the proceeds of the sale as in *Rangasami Nadan v. Subbaroya Iyer* (7). Ought she to have done so and if she ought to have, ought the Court to have refused to notify the mortgage at the sale? The Court certainly did not decide that the property should be sold free of encumbrances. It was not even aware of the existence of the prior encumbrance. If the prior mortgage had been held by a person not a party to the suit, that person might have asked the Court to notify it at the sale and it would have been the duty of the Court to notify it under O. 21, R. 66 (2) (c). The appellants must have been aware of the prior mortgage and cannot have been misled by the failure of the respondent to mention it in her plaint. Therefore, there is no case of estoppel against the respondent. As the Court did not decide that the property should be sold free of encumbrances and the respondent was not estopped from asking the Court to notify the prior mortgage, it appears to me that the respondent was entitled to have the prior mortgage notified for the information of bidders at the sale. Possibly the Court might have ordered that the prior mortgage should be discharged out of the proceeds of the sale but the Court was not asked to do that. The sale has in fact taken place subject to the prior mortgage. I would dismiss this appeal with costs.

Roe, J.—My only difficulty with regard to this suit has been that there was ground for suspicion that the plaintiff had deliberately omitted mention of her prior mortgage in the original suit. With the law as it stood then, there was a danger that she might be non-suited if the existence of the usufructuary mortgage was brought to light. But this difficulty vanishes on the consideration that had that been the fact it was open to the defendant to bring the existence of the usufructuary mortgage to the notice of the Court. There could be no doubt whatever in her mind as to its existence for the plaintiff was in actual possession of the land. If it was indeed the intention of the plaintiff to conceal from the Court the existence of this mortgage, the concealment was connived at by the defendants with the hope, no doubt, of securing a sale of the property free of the prior mortgage. Had the prior mort-

gagee been a third party the plaintiff, as the learned Chief Justice has shown, was not required to bring him upon the record or mention his mortgage. It follows that since she herself was the prior mortgagee, she was not required to bring herself upon the record in the capacity of a prior mortgagee nor to mention her own mortgage. She was entitled to put up for sale the equity of redemption upon which her advance had been made. If the defendants had brought the prior mortgage to the notice of the Court, it would have been open to the Court to make a decree in accordance with S. 57, T. P. Act. It is too late now for a decree to be made under the terms of S. 57. The only course open to the Court in execution is to put up for sale the right, title and interest of the mortgagor as it stood at the date of the mortgage. That right, title and interest at the date of the mortgage was subject to the usufructuary mortgage. The result is that the sale of the mortgaged property will only pass the interest of the mortgagor subject to the prior mortgage.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 115

MULLICK AND ATKINSON, JJ.

Janak Kishore and others—Petitioners,
In the matter of.

Misc. Judicial Cases Nos. 81, 82 and 83 of 1916, Decided on 30th October 1916 against order of Dist. Judge, Darbhanga, D/- 25th July 1916.

(a) Legal Practitioners Act (1879), S. 14—Enquiry under S. 14 is administrative and is not civil proceeding, subordinate Courts being consequently entitled only to recommend to High Court action to be taken.

The enquiry contemplated under S. 14, Legal Practitioners Act, is of an administrative nature and is not a civil proceeding, the intention of the Act being to provide a procedure or remedy of a disciplinary character for practitioners practising in subordinate Courts without giving the Courts the power to inflict a penalty for abuse of discipline but only to recommend to the High Court the course to be taken. It is neither civil nor criminal, but purely designed for the purpose of discipline. [P 116 C 1; P 117 C 2]

(b) Legal Practitioners Act (1879), S. 14—Proceedings cannot be transferred to another Court—Ss. 24 and 141 of Civil P. C. and S. 107, Government of India Act, are inapplicable to Legal Practitioners Act.

Proceedings under S. 14 of the Act cannot be transferred under S. 24, Civil P. C., read with S. 141, of the Code or by virtue of the powers of superintendence vested in the High Courts under S. 107, Government of India Act. Neither S. 24 nor S. 141, Civil P. C., applies to the

Legal Practitioners Act, because the proceedings under the latter Act are not civil proceedings in a Court of civil jurisdiction to which alone the Civil Procedure Code is applicable. [P 161 C 2; P 117 C 1]

(c) Civil P. C. (1908), S. 141—S. 141 is applicable only to proceedings of Court exercising Civil jurisdiction.

S. 141, is controlled in its operation and effect by the concluding words of the section, which limit its application to proceedings in any Court exercising civil jurisdiction. The procedure under the Legal Practitioners Act is self-contained. [P 117 C 1]

(d) Legal Practitioners Act (1879), S. 14—Enquiry should be made by Court in which malpractices were committed—High Court should not interfere with enquiry pending in lower Court, irrespective of question of applicability of Government of India Act (1915), S. 107.

Per *Mullick, J.*—The terms of S. 14, Legal Practitioners Act, make it incumbent that the enquiry under the section should be made by the presiding officer of the Court. It cannot be delegated or transferred to another officer who is not the presiding officer of the Court in which the malpractices complained of were committed. Without expressing any opinion as to the applicability of S. 107, Government of India Act, it is sufficient to say that the High Court should not interfere with the progress of an enquiry in which nothing final can be done by the presiding officer. [P 117 C 1]

(e) Government of India Act (1915), S. 107—"General superintendence" of High Court applies to cases where subordinate officer acts without or in excess of jurisdiction and abuses powers.

Per *Atkinson, J.*—This "general superintendence" vested in the High Court under S. 107, Government of India Act, applies only to cases where a subordinate officer, be he a Judge or otherwise, acts without jurisdiction or in excess of jurisdiction. When a duly constituted officer acting within jurisdiction makes a charge and proceeds to hold an enquiry, the High Court will not interfere under the Statute unless he has grossly abused his power. [P 117 C 2]

S. Sinha and Rajendra Prasad—for Petitioner.

Mullick, J.—The petitioners in these three Rules are Legal Practitioners against whom proceedings under S. 14, Legal Practitioners Act, were taken by the Munsif of Samastipur. After the proceedings were taken, but before any evidence was recorded, the petitioners moved the District Judge for the transfer of the inquiry from the Court of the Munsif to some other Court. The District Judge, while holding that he was competent to order a transfer under S. 24, Civil P. C., found that the balance of convenience was in favour of the inquiry being held by the Munsif, and he accordingly declined to transfer the proceedings from the file of the Munsif to that of any other officer. The petitioners then came to us and ob-

tained these Rules directing the Munsif to show cause through the District Judge why the proceedings should not be transferred. Cause has now been shown, and learned counsel on behalf of the petitioners has argued their cases very fully and ably before us. The first point urged is, that the learned Munsif is wrong in maintaining that this Court has no jurisdiction to direct a transfer under S. 24, Civil P. C. Now, although the fact that the case of *Purna Chunder Pal*, In the matter of (1) was, in consequence of a difference between two Judges of a Division Bench, referred to a third Judge under S. 575, Civil P. C., 1882, may lead to the inference that in the opinion of the Calcutta High Court a proceeding under S. 14, Legal Practitioners Act, was subject to the provisions of the Civil Procedure Code, yet on a careful perusal of the three judgments passed in that case it is quite clear that the precise point whether the Civil Procedure Code was or was not applicable to a proceeding under S. 14, Legal Practitioners Act, was never considered. In that case two Judges of a Division Bench having disagreed, the Chief Justice referred the matter to a third Judge for final decision; and although in the order of reference mention is made of S. 575, Civil P. C., 1882, the point whether that section was really applicable to the proceeding was not raised or argued before any of the learned Judges.

Giving my best consideration to the arguments advanced by the learned counsel before us to-day, I have no doubt that the Civil Procedure Code is not applicable to inquiries under S. 14, Legal Practitioners Act. The learned counsel relies upon S. 141, Civil P. C., 1908. In my opinion that section does not apply, for the simple reason that the disciplinary proceedings taken by the Munsif were not proceedings in a Court of civil jurisdiction. I am of opinion that S. 141, Civil P. C., does not contemplate an inquiry of an administrative nature, such as is prescribed by S. 14, Legal Practitioners Act. The learned counsel then falls back upon S. 107, Government of India Act of 1915, and he asks us in exercise of our powers of superintendence to interfere and to direct a transfer. Without expressing any opinion as to the applicability of S. 107, I think it sufficient to say

that in the case before us we ought not to interfere with the progress of an inquiry in which nothing final can be done by the learned Munsif. But apart from that it is clear that we are precluded from interfering even if we wished to do so by the very terms of S. 14, Legal Practitioners Act, which make it incumbent that the inquiry should be made by the presiding officer of the Court. The section leaves no room for the contention that the inquiry may be delegated or transferred to another officer who is not the presiding officer of the Court in which the malpractices complained of were committed. In this view of the case I would discharge the rules without costs.

Atkinson, J.—Mr. Sinha, who argued this case with his usual candour and ability, admitted that the applications in these three cases were instituted under S. 24, Civil P. C., and he said under that section these applications came under the words "other proceeding;" that they constituted in effect a proceeding which would give this Court jurisdiction to exercise its power of transferring the proceedings from one Court to another. He supported that argument by a reference to S. 141, Civil P. C. But on reading S. 141, Civil P. C., it appears to me obvious and plain that that section can have no reference whatsoever to a proceeding instituted under the Legal Practitioners Act of 1879. S. 141 is controlled in its operation and effect by the concluding words of the section, which limit its application to proceedings in any Court exercising civil jurisdiction. Those words are the key-note for the construction of the section itself. In my opinion, it is clear that a proceeding under the Legal Practitioners Act is not a civil proceeding. The intention of the Act of Parliament (*sic*) was to provide a procedure or remedy of a disciplinary character for practitioners practising in subordinate Courts. It provides a procedure to be followed, and nominates the person who should hold the inquiry and make the charge. It gives no power to inflict any sentence or penalty. It merely gives the power of recommendation, with a safeguard of a very wide right of appeal to the High Court upon the entire evidence that has been taken and upon the recommendations that have been made. The procedure under this statute is, in my opinion, self-contained. It is neither

criminal nor civil, but purely designed for the purpose of discipline in controlling the procedure and the conduct of practitioners practising in subordinate Courts.

Mr. Sinha, finding that the latter argument cannot be sustained, then falls back on S. 107, Government of India Act, and relies upon the general power of superintendence which that section confers upon the High Court to support his present application. I am not at all too sure that he has not, in the course of his argument, given for too wide an interpretation to the words "general superintendence;" because, as I gather, in this Court it has now been held that superintendence applies only to cases where a subordinate officer, be he Judge or otherwise, acts without jurisdiction or in excess of jurisdiction. If, having jurisdiction, he decides a case or a fact wrongly, that does not give the High Court jurisdiction under its power of superintendence to interfere with his finding of fact. I ask them, had this officer jurisdiction? I find that he had jurisdiction to enter upon this inquiry. If I find he had jurisdiction to enter upon this inquiry, under the statute he had power to make the charge he did against these professional gentlemen. How can I then say that S. 107 gives us any power to exercise the right of superintendence, irrespective altogether of the argument of my learned brother, who points out that the person who is nominated by statute is the presiding officer in whose Court the misconduct takes place? Nevertheless I find that a duly constituted officer acting within jurisdiction makes a charge and proceeds to hold an inquiry under the statute; I cannot say that we have under S. 107 that right to interfere, unless we find that he has grossly abused his powers, or that he has acted in excess of his jurisdiction, or done something without jurisdiction.

But that is not this case. Irrespective of the construction that may be put upon S. 107, Government of India Act, I am of opinion that it is not open to the parties at this stage of the proceedings to entirely amend or frame a new application which was not the application on which they came before the Court and on which they obtained their Rule. Suffice it to say that under S. 24 I am of opinion that this application is

not sustainable and it should be dismissed without the usual penalty.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 118

CHAMIER C. J. AND SHARFUDDIN, J.
Ram Kumar Lal Bhagat—Appellant.

v.

Raja Mukund Sahi—Respondent.

Appeal No. 582 of 1914, Decided on 16th November 1916, from Original order of Addl. Sub-Judge, Hazaribagh, D/- 13th November 1914.

Civil P. C. (5 of 1908), O. 22, R. 10—Plaintiffs' decree for "mesne profits" against Defendant—Property in dispute leased out—Lessees can be compelled to give account for profits that they might have received from the land.

The language of O. 22, R. 10, Civil P. C. covers the case of leases granted by a defendant during the pendency of a suit. [P 118 C 2]

Plaintiffs obtained a decree for mesne profits against defendants, who during the pendency of the suit had granted leases. The leases created 'interests' in the property in suit within the meaning of R. 10, O. 22, in favour of the lessees, and compelled to account for any profits which they might have received from the land: 39 Cal 220, *Ref.* [P 120 C 1]

Pugh, K. P. Jayaswal and Jamini N. Mukerji—for Appellant.

Hasan Imam, Purnendu Narayan Sinha, Binod Bihari Mazumdar and Bankim Chandra Dey—for Respondents.

Chamier, C. J.—This appeal arises out of a suit which was brought by the appellants on 17th April 1907 for possession of six villages in the Hazaribagh District. The Subordinate Judge on 21st September 1908 dismissed the suit. In December of the same year there was an appeal to the Calcutta High Court and on 15th May 1913 that Court allowed the appeal and passed a decree in favour of the present appellants for possession of the six villages. As there was some doubt regarding the boundaries of the villages the Court directed the Subordinate Judge to enquire into the matter and ascertain the exact areas affected by the decree. The Court also granted the appellants an injunction restraining the respondents to that appeal from taking mica from the mica mines in the villages and from cutting and removing wood from the jungles. The Court further ordered an account to be taken of the mesne profits to which the appellants were entitled for the three years prior to the institution of the suit and thereafter till deli-

very of possession to the appellants or the expiration of three years from the date of the decree. On 10th March 1914 the Subordinate Judge took up the case and appointed an amin to ascertain the boundaries of the villages. On a later date he ordered the amin to ascertain also the amount of mesne profits due to the appellants. On 17th August the amin made his report according to which a number of persons had during the suit been working the mica mines in the property under leases granted by the principal defendants. On 4th, September 1914, the appellants presented a petition to the Court praying that the Maharaja of Cossimbazar, Seth Sundar Mul of Giridih and four other persons might be made parties to the proceedings in order that the amount of mesne profits might be ascertained in their presence. The appellants alleged that the six persons named in the petition had been working the mica mines under leases granted by the principal defendants to the suit and had carried off mica valued at nearly two lakhs of rupees. The Subordinate Judge rejected the petition.

He was of opinion that the word "assignment" in R. 10 of O. 22 did not include a lease of any kind, secondly that the word "interest" in the same rule meant only the whole interest, the subject matter of the suit, and thirdly, that it was not necessary to make assignees pendente lite parties to the proceedings inasmuch as they were bound by the decree passed against their assignors. As regards the first two reasons given by the Subordinate Judge, I think it is sufficient to say that the language of R. 10 of O. 22 is sufficiently wide to cover the case of leases such as those which are alleged to have been granted by the principal defendants in the present case during the pendency of the litigation. R. 10 (1) is as follows:—

"In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

According to the appellants, and for the present it must be assumed that they can prove their allegations, the Maharaja took from the principal defendants a lease of several mica mines for a period of 20 years and Seth Sundar Mul took a similar lease but for a shorter

period. In my opinion, if the allegations now made are correct interests were created in the property in suit within the meaning of R. 10 of O. 22 in favour of the persons now sought to be added as parties. It was suggested in the course of the arguments that the appellants were seeking, by the application now in question, to extend the scope of the suit. But a reference to the plaint shows that there is no force in this. The appellants alleged that defendants 1 and 12—15 had executed leases of the mines and jungles in favour of defendants 2—11, and defendants 2—11 were impleaded in the suit with the express object of compelling them to account for the mica and wood carried away by them. It is, therefore, clear that from the first the appellants intended to enforce their rights against all persons who had trespassed on the property. They were not content, as plaintiffs so frequently are, to claim against the principal defendants only the rents received by them from actual cultivators of the soil or from persons holding under-leases. On the allegations contained in the plaint defendants 2—11 were jointly liable to the appellants for the profits of the property. What the appellants now say is, in effect, that the persons whom they desire to make parties to the suit have taken the place of defendants 2—11. It cannot be said that the appellants are now seeking to extend the scope of the suit.

Then it was suggested that there had been great delay on the part of the appellants in applying to have the six men added as parties. As stated above the suit was instituted in April 1907 and was dismissed in September 1908. The decree of the Calcutta High Court was not passed till 15th May 1913. It may be that one or more of the persons sought to be added as parties took leases of the property before the suit was dismissed by the Subordinate Judge, but according to the allegations now made some of them did not take their leases until after the Subordinate Judge had dismissed the suit. In my opinion no blame attaches to the appellants for failing to make an application for the addition of parties while the appeal was pending in the Calcutta High Court. It was desirable, if not necessary, for the appellants to obtain a decree for possession against the original defendants before attempting to recover

profits from persons who had acquired interest during the suit. I am not prepared to reject the application on the score of delay. We were referred by learned counsel for the appellants to the case of the *Midnapore Zamindary Co. Ltd. v. Kumar, Naresh Narain. Ray* (1) as being a case exactly in point. Respondents contend that that case is distinguishable from the present case. In that case it appears that a decree for possession was passed by the High Court of Calcutta in December, 1906, against Robert Watson and Co., Ltd, and a direction was made that the amount of mesne profits due to the plaintiffs should be ascertained. The decree-holders then applied to the Court to add as parties to the proceedings a Mr. Gregson and the Midnapore Zamindari Co. Ltd., on the allegation that they had successively purchased the property in suit in 1902 and 1906, and the decree-holders contended that they were entitled to have them made parties and compel them to account for the profits of the property during the period of their possession. The claim was allowed. That case is of course distinguishable from the present case for it appears that the whole property in suit was the subject of the transfer of 1902 and 1906, but it appears to me that there is no difference in principle between the two cases. There as here the persons who acquired interests during the suit were bound by the decision passed in the suit. There as here according to the allegations now made the persons who acquired interest during the suit were in wrongful possession of the land. In that case the learned Judges said:

"The true test, as it seems to us, is whether they were in wrongful possession of the land, if they were, and it is admitted that they were, they are liable to pay the profits they actually received, or might with ordinary diligence have received, therefrom."

In my opinion the appellants are entitled to have the persons in question added as parties to the proceedings and to compel them to account for any profits which they may have received from the land. I may point out that if an application of the kind now before us is rejected, the decree-holders are practically without a remedy. Assuming that they are entitled at all to bring a fresh suit against the persons who have taken leases during the pendency of the suit they will be

1. (1912) 39 Cal 220=11 I C 939.

met by the bar of limitation. They are not responsible for the delay that occurred in the disposal of their appeal to the High Court, and I see no reason why they should not compel the persons who have trespassed on their property during the pendency of the suit under leases and pattas granted by the defendants to the suit to account for the profits which they have received. It was suggested that in any view of the case Seth Sunder Mul should not be made a party because it is alleged only that he took a lease of part of the property in the name of another man. I see no reason for distinguishing the case of Seth Sunder Mul on this account. It is open to the appellants to prove that though the lease is in the name of another man it was taken by and for the benefit of Seth Sunder Mal. I would, therefore, allow this appeal, set aside the order of the Subordinate Judge and direct him to make the six persons in question parties to the suit and ascertain the mesne profits in their presence. Costs of this appeal should be costs in the cause.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 120

MULLICK AND ATKINSON, JJ.

Brij Behari Singh and others—Defendants—Appellants.

v.

Sheo Sankar Jha and others—Plaintiffs—Respondents.

Appeal No. 358 of 1913, Decided on 19th December 1916, from original decree of Sub Judge, Darbhanga, D/- 29th May 1913.

(a) Bengal Tenancy Act (1885), S. 30—Entry in the Record of Rights is mere rebuttable piece of evidence—It is not necessary for landlord to get entry declared wrong before he wants to sue.

An entry in a Record of Rights is merely a rebuttable piece of evidence. It is not necessary that the landlord should get the entry declared wrong before he can sue for enhancement of the rent under S. 30, Ben. Ten. Act: 1 P L J 73; 11 C W N 48; 20 All 35 and 31 All 10 n, Dist.

[P 121 C1, 2]

(b) Limitation Act (1908), Arts. 131 and 120—Suit for enhancement of rent of an occupancy tenant wrongly recorded as fixed rent tenant is governed by Art. 131 and not by Art. 120—Limitation runs from date of refusal.

A suit for the enhancement of rent of the holding of an occupancy tenant who has been wrongly entered in the Record of Rights as a raiyat at fixed rates is governed by Art. 131 and not by Art. 120, Lim. Act.

[P 121 C 2]

The claim to enhanced rent is a recurring cause of action and limitation runs from the date of refusal. [P 121 C 2]

P. R. Dass, Ganesh Dutt Singh and Shivanandan Rai—for Appellants.

Naresh Chandra Sinha—for Respondents.

Mullick, J.—By a registered kabuli-yat dated the 19th Falgun, 1281 F. S., the predecessor of the defendants took settlement from the predecessors of the plaintiffs of a holding measuring 23 bighas 6 cottahs and 18 dhurs at an annual rental of Rs. 72-7-6, exclusive of cesses, for a term of eighteen years. These lands are entered in Sch. 1 to the plaint. The defendants had also another holding of 30 bighas 12 cottahs and 4 dhurs under the plaintiffs, which is described in Sch. 2. Although in the plaint the plaintiffs claim that this holding is bhowli it has not been seriously disputed at the hearing of the appeal before us that the defendants are occupancy raiyats paying a cash rent and the only question is whether the rent of Rs. 19-12-0 inclusive of cesses recorded in the Record of Rights published on 5th December 1899 should be enhanced to Rs. 67-9-10 1/2 as has been done by the learned Subordinate Judge in the Court below.

With regard to the first holding the plaintiffs allege that the entry in the Record of Rights showing the defendants as raiyats at fixed rates is wrong and that the rent is liable to enhancement in order to accord with the prevailing rates of surrounding lands with similar advantages and on account of the rise in the price of food grains within ten years preceding the institution of the suit in 1911. The Subordinate Judge found that the entry was wrong, but that the plaintiffs having failed to sue for a declaration of its erroneous character within six years after the date of the publication the present suit for enhancement was barred by limitation under Art. 120, Lim. Act. He also found that the plaintiffs had failed to establish a right to enhancement either on the ground of prevailing rates or on the ground of a rise in the price of food grains. He accordingly dismissed the plaintiffs' claim with regard to the holding in Sch. 1. With regard to Sch. 2 he has, as already stated, raised the rent from Rs. 19-12-0 inclusive of cesses to Rs. 67-9-10 1/2 exclusive of cesses. Against this decree the defendants have preferred

the present appeal and the plaintiffs a cross-objection. I will deal first of all with Sch. 1.

The learned Subordinate Judge is in my opinion wrong in holding that the suit is barred by six years' limitation. It is true that in the plaint the first prayer that the plaintiffs make is that it may be declared that the defendants have only an occupancy right in the lands and that they are not jotdars at fixed rates of rent, and they date the cause of action in this respect from 5th December 1899, that is, the date of the final publication of the Record of Rights. Now if the suit had been one for mere declaration, it would have been, in my opinion, one contemplated by the latter part of S. 111-A, Ben. Ten. Act (Act 8 of 1885 as amended by Act 3 of 1898), which is the Act applicable to the case. This was the view taken in *Amiruddin v. Saidur Rahman* (1), where it was held that if a suit is substantially such a declaratory suit as is contemplated in the proviso of S. 111-A, Ben. Ten. Act, then the plaintiff cannot, by adding a prayer for confirmation of possession, escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the Record of Rights [*Ram Gulam v. Bishnu Pargash Narain Singh* (2) and *Francis Legge v. Rambaran Singh* (3)], unless there has been any subsequent invasion of the plaintiff's right, in which case it starts from the latter date [*Robert Skinner v. Shanker Lal* (4)].

If it had been necessary for the plaintiff as a condition precedent to enhancement to declare the entry to be erroneous, then I think he would have been bound by the ratio decidendi in *Malkarjun v. Narhari* (5) and *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri* (6). In the former case the plaintiff's claim involved the setting aside of an execution sale and in the latter of an adoption. In both title had passed to the defendants. But an entry in a Record of Rights neither creates nor extinguishes rights; it is merely a rebuttable piece of evidence. I see no reason why the plaintiffs should in the present case have the entry de-

clared wrong before they can succeed in their suit to enforce their right to enhancement. Whatever presumptive value attached to the entry has been sufficiently rebutted by the entry itself, which shows that it was based on an admittedly erroneous construction of the kabuliyat of 1881. The next question is whether the suit for enhancement is in time. The answer must be in the affirmative, for Art. 131, Lim. Act, governs the case. The claim to enhanced rent is a recurring cause of action and limitation runs from the date of refusal. Here the plaintiffs' right to enhance the rents is based not on contract, but on Statute. The kabuliyat gave them power to assess a fresh rent on its expiry in 1892, but by that time the defendants had acquired occupancy rights. They have made no previous demand nor has any case of adverse possession been made. The suit, therefore, is in time.

In my opinion, therefore, the learned Subordinate Judge was wrong in holding that the suit is governed by Art. 120 and that it is barred. But even if it had been governed by that Article, it would still be within time. It appears from the pleadings and the evidence that when Madho Prasad, the paternal grandfather of the minor plaintiffs 5 and 6, died in 1898, Awadh Behari Singh, the father of these plaintiffs, was a minor and that he, Awadh Behari, died in 1907 before attaining majority. Admitting, therefore, that six years' limitation began to run from 5th December 1899 (the date of the publication of the Record of Rights), the minorities first of Awadh Behari and then of his two sons bring into operation S. 6, Lim. Act, and give the minors time till three years after attaining majority. Next, by the operation of Art. 7, Lim. Act, the remaining plaintiffs also are entitled to the benefit of this extension of time. Therefore, even on the view taken by the learned Subordinate Judge the suit is not barred by limitation. With regard to the holding in Sch. 2 no question of limitation arises. The defendant does not dispute the Record of Rights, which shows it to be an occupancy holding. The only question, therefore, which remains is whether the plaintiff has made out any case for enhancement in respect of either holding. A large amount of oral and documentary evidence has been given on both sides, but in my

1. (1916) 1 P L J 73=35 I C 433.

2. (1907) 11 C W N 48.

3. (1898) 20 All 35.

4. (1909) 31 All 10 n=1 I C 556.

5. (1901) 25 Bom 337=27 I A 216 (P C).

6. (1886) 13 Cal 303=13 I A 84 (P C).

estimation it is quite impossible to rely upon it for the purpose of fixing the prevailing rate, indeed it is clear that the learned Subordinate Judge felt this difficulty and consequently addressed himself to the task of making a rough and ready assessment of fair rent. His proper course was to accede to the plaintiffs' prayer for the appointment of a Revenue Officer as Commissioner. Mr. Das, on behalf of the plaintiffs, is still anxious to have such a local investigation and Mr. Ganesh Dutt Singh, on behalf of the defendants, does not seriously oppose. At the risk of still further prolonging this suit, so unduly protracted and so unsatisfactorily tried by the Court below, I think we must set aside the judgment and decree of the Court below and remand the case for further hearing with the following directions:

The lower Court will forthwith issue a commission under S. 31 (b), Ben. Ten. Act, to a Revenue Officer for a local investigation. The Commissioner's duty will be as follows: (1) To ascertain what is the prevailing rent, namely, the rent paid by the majority of the tenants for lands of similar description with similar advantages in the village as explained by Mitter, J., in *Sailhoo Singh v. Ramanoo-graha* (7). (2). If by reason of the application of S. 29, Ben. Ten. Act, or the absence of any prevailing rate within the village in which the holdings in suit lie, the rates in the village cannot serve as a guide, then to ascertain what is the prevailing rate in the neighbouring village or villages. (3). If no one prevailing rate can be found in any village, then to ascertain what is the lowest rate paid by lands of similar description with similar advantages. (4) To ascertain what would be the prevailing rate if S. 31 (a), Ben. Ten. Act, had applied to the lands in suit. The Court below will direct the above inquiry to be completed within three months and on receipt of the Commissioner's report will, in respect of each holding, adopt in order of merit the rate found by the Commissioner either under the 1st, 2nd, 3rd or 4th head of inquiry, as the case may be, after paying due attention to the terms of S. 31. We accept the lower Court's finding that the plaintiffs are not entitled to enhancement on the ground of rise in the price of fool

7. (1868) 9 W R 83.

grains. This part of its decision has not been seriously challenged.

Atkinson, J.—I concur.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 122

MULLICK AND ATKINSON, JJ.

Baldhari Singh—Plaintiff—Appellant.

v.

Basar Ali Kalal and others—Defendants—Respondents.

Appeal No. 412 of 1913, Decided on 11th December 1916, from Original decree of 1st Sub-Judge, Patna, D/- 15th August 1913.

(a) **Contract—Suit on—Onus is on plaintiff.**

A plaintiff suing upon a contract must establish it conclusively to the satisfaction of the Court.

[P 124 C 2]

(b) **Evidence Act (1872), S. 114, Illus. (g)—Plaintiff failing to prove his case—Failure of defendant to produce account book—Plaintiff's case is not strengthened.**

Where the plaintiff has failed to prove his case, the omission by the defendant to produce his account-books does not give rise to a presumption that if produced, they would have lent support to the plaintiff's case: *A. I. R.* 1915 P. C. 96 (P. C.), *Ref.*

[P 125 C 2]

P. R. Das and *Ganesh Dut Singh*—for Appellant.

Kulwant Sahai and *Fakhurud Din*—for Respondents.

Atkinson, J.—The plaintiff sues in this action to recover Rs. 11,927-9 from the defendants. This sum represents principal and interest calculated up to 6th September 1912. The original contractual relationship arose between the parties on 12th August 1906. Let us see for a moment what is the contract which the plaintiff relies upon to sue in this action. The contract alleged is that he the plaintiff was induced by the defendants, who are related one to the other and carry on a joint distillery business, to lend them from time to time money for the purpose of their business, and that at the time the contract was made it was agreed that one open banking account should be kept between the plaintiff and the several defendants jointly, on the ground that it was money being raised or borrowed in the form of a banking transaction for the benefit of the joint business. That is the form in which the plaintiff sets forth his cause of action in his plaint. Let us see if he has established that contract by the evidence adduced on his behalf. In my opinion it is clear that the plaintiff has not established the

contract which he pleads. No evidence is given to show that these defendants were joint; no evidence is given that they represented themselves as carrying on a joint business in a distillery concern. The only evidence that is given by the plaintiff is that upon 12th August 1906 at about 8 o'clock in the morning at the plaintiff's house the several defendants were there with others; and that one Bakar Kahal, one of the defendants, opened negotiations with the plaintiff as to the borrowing of money for the benefit of the business. Nothing is shown as to how the defendants, or each of them, were jointly concerned so as to be liable for the joint debt. The plaintiff himself was the only witness who could have given evidence to prove the contract set forth in his plaint, but he has not been called and has given no evidence at all to establish what was the true contract which he alleged existed between himself and the defendants.

One thing that is decidedly noticeable in this case is that the inception of the business relationship alleged to have been established between the plaintiff and the defendants is of a most unusual and peculiar character, having regard to the ordinary custom prevailing in such matters in this country as well as the plaintiff's own usual course of dealing. There is no document signed, there is no agreement made in writing, there is no evidence of any kind produced, to show the terms on which this contract was made. It is pleaded only as a verbal contract and no more. And although the banking relationship went on between the plaintiff and the defendants for over six years, and continued in all up to 1912, yet there is not one shred of writing of any kind or description by the defendants in support of the plaintiff's case. We have only to see if the contract has been made; and if it has been made, whether the evidence is so coercive and strong as to induce us to hold that we should be bound to give the plaintiff judgment for the sum which he claims. Not a shred of writing or any documentary evidence, save the *bibi*, is produced, covering the whole period from 12th August 1906 to 15th April 1912. It is alleged that this business which was conducted by the plaintiff with the defendants was something outside an ordinary money-lending transaction, and was in the nature of a banking business. If it

was a banking business, it appears to me that the whole course of dealing between the parties, as proved by the plaintiff, is utterly inconsistent with banking business in its ordinary sense. Withdrawals were made from time to time, without cheque, without draft—merely upon verbal demand; lodgments were made from time to time by the defendants, and no receipts were given; and note the peculiar method of lodging on the last day of each month a small sum, and on the succeeding day—the beginning of the next month—the withdrawal of a much larger sum.

The fact that this was the course of dealing consecutively for years, six years in all, seems to me a very peculiar and illogical and improbable transaction. No demand was made by the plaintiff upon the defendants prior to the action brought on foot of the alleged debt. The last loan obtained was on 15th February 1910, no withdrawals were made after that date; interest has been calculated up to 15th April 1912; and during these two years no demand of any kind or description was made by the plaintiff upon the defendants to discharge and satisfy the debt which he alleged they owed him. That to my mind, is most significant. The first demand for payment that was made by the plaintiff upon the defendants was the issue and service of the plaint. All these matters have to be taken into consideration in testing the bona fides of this claim. The entire absence of independent evidence to corroborate the plaintiff's case as proved by his three witnesses—whose evidence must, I think, be viewed with some suspicion—cannot be lost sight of. The corroboration alleged to exist is alleged to exist because other persons were present besides the contracting parties at the time the contract was made and they have not been called. Interest is alleged to have been reduced in May 1907 at the request of all the defendants, and a man called Golaman was present, and yet he is not called; his presence is admitted by witness 2 for the plaintiff, he would have been a very material witness in support of the plaintiff's case if in May 1907 the defendants had come to the plaintiff and said:

"Will you now please agree to relax the rate of interest which you are charging us on foot of the several drafts with you in accordance with our original contract of 1906."

Here is an independent person who might have clinched the case for the plaintiff and yet he was not called. There were six or seven persons present at the making of the original contract, and they have not been called. In no one particular has the plaintiff produced any corroborative evidence of his claim, save and except the pass-book. I may say this pass-book has a very suspicious appearance. It is noticeable in its regular uniformity of all entries; it is written up in copy-book style, and these entries in their uniformity seem to me to negative the idea of entries made from time to time as the transactions took place. Mr. Das on Friday called this pass-book a ledger; to-day he has receded from that position and says it contains the original entries made from time to time as each transaction took place over the whole period of six years. Well, whether it be a ledger or be the book of original entries, it appears to me to bear upon its face suspicion and doubt; and this is so all the more because you find intermingled with the account of the defendants at the end of the year 1909 the account of another person not a party to this suit, covering the period of one year if not more, and then we find the defendants' account following on in the succeeding years 1910, 1911 and 1912. The account book is inaccurate and it is also false in some of its calculations. I do think importance is to be attached to the two points made by Mr. Kulwant Sabai as to the interest charged for the month of February in the leap years 1908 and 1912, as well as the point he makes that interest is calculated on the money for the entire month, when admittedly it was only outstanding for a part.

It is all very fine for the plaintiff to throw this book on the table and say: "there it is: It is *prima facie* evidence of my claim; it must be accepted." But where the plea of forgery is alleged, it is necessary to scrutinise this account book with the greatest possible care; and viewing that book in its entirety and appealing to myself as a Judge of fact, I cannot bring myself to arrive at the conclusion that this book is a book honestly made and kept honestly day by day as a record of the entries of the transactions it purports to deal with. Suspicion, in my opinion, is written broadcast upon its face. It is a book I think unreliable; and its value is not enhanced by the witnesses

called to support it, *videlicet*, witnesses 1, 2 and 3 for the plaintiff.

They are the plaintiff's servants, who have been in the plaintiff's employment for many years, and who no doubt are anxious to serve their master. The plaintiff fails to appear as a witness on his own behalf. His non-appearance is striking. With him the alleged contract was supposed to have been made. Suddenly when the case has been pending a year, and is on the point of being heard, a petition is filed claiming an adjournment on the ground that the plaintiff is ill; the petition is unverified by affidavit and no doctor's evidence or certificate is forthcoming in corroboration to support it. It states that the plaintiff is unwell, that he is in ill health, and has been obstructed in attending Court by the floods. There is not a tittle of evidence to support this, beyond the blank statement in the petition itself. The plaintiff was a vital witness on his own behalf to prove the making of the contract and its terms. He alone made the contract; he alone could prove it. Witnesses 1 and 2 who are called to prove the contract were only bystanders, and in my judgment these witnesses do not prove the contract pleaded. In no part of their evidence can you show that the contract was made with the defendants jointly and for the purpose of carrying on a joint business. I think that this is the foundation of the plaintiff's claim. The onus is on the plaintiff to establish conclusively the contract he alleges. The factum of the contract has to be established to the satisfaction of the Court. If the plaintiff fails to discharge this onus he cannot succeed; and due weight must always be given to the finding of the Primary Court who saw and heard the witnesses adduced for the plaintiff and who could more fully and conclusively arrive at a clear conclusion as to the value of their testimony and the degree of credit to be attached to it. I hesitate to dissent from the opinion expressed by the Subordinate Judge as to the value to be attached to the evidence given by the plaintiff's witnesses, more especially as I find the case in its inherent features and probabilities gravely suspicious and doubtful.

The disappearance of the account-book alleged to have been given to the defendants is remarkable, if it ever existed. But even the history of this book is

peculiar. The object of this book, if any, was to keep a check on the entries in the plaintiff's ledger, and yet we find this book kept and entered up by the plaintiff's dewan, witness 2. The alleged physical custody of the book was with the defendants, yet the entries were made by the plaintiff's clerk, when and where is not proved. And there seems an utter lack of genuine and convincing proof as to the reality and existence of this second account-book. Why, if the book was for the protection of the defendants, should it be kept and entered up by the plaintiff's clerk? It is not a usual way certainly of doing business. And what is significant is that throughout the many years pending before the hearing of this suit no application was made by the plaintiff calling upon the defendants to produce the alleged account-book, which he says he gave them and which forms the basis of the contract referred to in para. 4 of the plaint.

Never a petition, never a summons, never a demand is made to produce the book, which he (the plaintiff) says he gave the defendants for the purpose of keeping a counter-record, and which was to be entered up by the plaintiff's servant. If his case was true he must have known that the book was in existence at the time and could have been preserved as a record, in the action instituted by him. However, he did not trouble to do anything of the kind, nor did he attempt to prove the contract to the conviction of the Court's mind. The evidence given by the defendants may be weak and false; this will not lessen the legal obligation the plaintiff is required to discharge. The defence is a categorical denial of the contract and of the fact of borrowing money from the plaintiff for a joint business or any business. The defendants, when the claim was put forward, asked for inspection of the plaintiff's account book, and they allege in para. 7 of the written statement that, that application was refused. Why, if this was an honest transaction, was inspection refused? It appears now from the record that persistently from September 1912 to April 1913 every available excuse was put forward by the plaintiff to conceal this book. Why, if he was an honest man, preparing an honest ledger and an honest account-book, did he refrain from producing it? I think

the nonproduction of this document when it was demanded throws a grave suspicion upon its genuineness.

Then it is alleged that the defendants should have produced their account-books, which would have shown whether they were joint or not; whether they got revenue licenses in their own names or jointly, and would otherwise have raised some degree of proof in support of the plaintiff's case. I cannot see why the defendants should be called upon to produce their books when no application was made upon them to do so. Their case is a denial, a traverse, of the entire case for the plaintiff; and that plea did not throw upon them, in my opinion, the responsibility of producing their books. They say:

"Your case is false from beginning to end. Your book is a forgery; your claim is false."

They were never served with notice to produce, never called upon to show their books; and now it is contended that because they did not produce their books, there is a presumption that, if produced, the books would have been against them. I cannot hold with that contention at all; it would be not only absurd but unjust, and in this case inequitable, to infer from the non-production by the defendants of their books, which were never called for, that the plaintiff's case was just and affirmatively proved. The sole question therefore is whether we believed that the contract sued on was made. We are of opinion that this contract, as pleaded, has not been proved. The only person who could prove it has not been called. We think that the books and the other evidence in the case adduced on behalf of the plaintiff are so untrustworthy and so unreliable that we would not be warranted, as judges of fact, in reversing the decision of the Subordinate Judge and in giving a decree in favour of the plaintiff for the amount of his claim. Accordingly we shall dismiss this appeal with costs, and the action with costs in all Courts.

Mullick, J.—I agree. I only desire to add a few remarks with reference to the argument addressed to us by Mr. Das to the effect that the omission by the defendants to produce their account-books leads to the inference that the plaintiff's case was true. In this connexion I desire merely to reproduce the words of their Lordships of the Privy Council in the case of *Bilas Kunwar v. Desraj*

Ranjit Singh (1). The words are as follows:

"These books do not necessarily form any part of the plaintiff's case, it is of course possible that some entries might have appeared therein relating to the bungalow. But is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference, such as is made in the High Court, that the books if produced would have shown rent credited to Jagmag or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow being therein is very remote, but even if it had been greater, the Court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents thereof."

In my opinion no adverse inference could have been drawn in this case by reason of the non-production of their account books by the defendants.

V.S./R.K. *Appeal dismissed.*

1. A I R 1915 P C 96=37 All 557=30 I C 299
=42 I A 202 (P. C.)

A. I. R. 1916 Patna 126

CHAPMAN AND ATKINSON, JJ.

Latif Hussain and others—Plaintiffs—Appellants.

v.

Basdeo Singh and others—Defendants Respondents.

Appeal No. 354 of 1912, Decided on 10th April 1916, from original decree of 2nd Sub-Judge, Gaya, D/- 6th March 1911.

Civil P. C. (1908), S. 11, Expl. 4—Contest between co-defendants in partition suit—Issue expunged—Decree giving right claimed to one party—Issue does not operate as *res judicata*.

In a partition suit one of the defendants, *T*, in her written statement, stated that the extent of her proprietary share was correctly stated in the plaint and that she too desired partition. Some time later, the other defendants in a written statement contested the suit on various grounds, and incidentally claimed that in addition to their proprietary share as stated in the plaint, they held a one-anna mokurari right under *T*. There was nothing to show that this claim to a mokurari was brought to the notice of *T*, who did not contest the partition suit. An issue was framed on the subject of the mokurari but was subsequently expunged. The final decree for partition however gave the contesting defendants

possession of the one-anna they claimed under the mokurari. In a subsequent suit:

Held: that the question of mokurari was not *res judicata* between the representatives of *T* and the other defendants to the partition suit, inasmuch as (1) the question was not raised in that suit except as between the plaintiff in that suit and the contesting defendants, there being nothing to show that *T* was cognizant of the claim; (2) the preliminary judgment in the partition suit stated that the issue as to the mokurari claim was expunged; (3) the question was not expressly decided, and it could not be held that a decision might and ought to have been obtained in the partition suit by *T*.

[P 128 C 2; P 129 C 1]

Khurshed Husnain—for Appellants.

Kulwant Sahai—for Respondents.

Chapman, J.—This appeal arises out of a suit for a declaration that the plaintiffs hold one-anna share in Mouzah Rampur, that the mokurari right which the defendants claim to hold in this one-anna share is not so held by them. The plaintiffs asked for a partition. The plaintiffs derived their title to the one-anna share from one Mt. Tamizan. The defendants claim to be the descendants of certain persons to whom the mokurari of one-anna share was granted in the year 1859 by one Bibi Bukhshan. The grant of the mokurari by Bibi Bukhshan is not denied. The contest is on the question whether the one anna, the mokurari of which was granted by Bibi Bukhshan, is the same one-anna as that which was purchased by the present plaintiffs. The right of the plaintiffs to one-anna share in the estate is not now disputed. The question for determination therefore is whether the defendants have been able to make out that their mokurari was attached to this one-anna share. It appears that the original entire 16-annas belonged to one Galib. He had two wives named Pati Begum and Bibi Bukhshan, and a son by Bibi Bukhshan named Shah Lal. Bibi Bukhshan had, as I have stated, granted a mokurari in 1859 of a one-anna share to the predecessors of the defendants. In 1862 the rights and interests of Mt. Bibi Bukhshan and her son Shah Lal in seven-annas were put up to sale in execution of a decree and purchased by two persons named Pairan and Sharifan.

In the remarks column of the sale certificate it is recited that an objection had been made by certain persons claiming under the mokurari granted by Bibi Bukhshan in the year 1859, which I have above referred to. There is then a conveyance by one Kabir, the son of Pairan,

acting as attorney for Pairan and Sharifan of two-annas share to Mahamdi Begum, the wife of Shah Lal, the son of Bukhshan. In this deed it is recited that the two vendors had purchased the seven-annas at the execution sale in 1862 in equal shares. The sale-deed is dated 16th January 1863. The deed makes reference to the fact stated in the sale-certificate that the holders of the mokurari had objected. Of the two-annas conveyed by this deed one half-anna belonged to Sharifan and half-anna to Pairan. Thus after the sale three-annas were left to Pairan and of these three-annas, two-annas devolved on Pairan's son named Kabir and one-anna on her daughter Latifan. The mokurari is said by the respondents to have been distributed proportionately and was thus held two-thirds under Kabir and one-third under Latifan. Latifan sold half of her one-anna share to one Mohur Singh under a conveyance of the year 1884.

She recites that she sells 10 dams out of the one-anna inherited by her from her father—the respondents had to say that the word “father” here is a mistake for “mother.” The other 10 dams were sold by Latifan to her daughter Amirul Fatima by a conveyance of the year 1888. This daughter sold the 10 dams to her uncle Kabir by a conveyance of the year 1890. Kabir had, as I have stated, previously inherited two-annas share. Kabir had thus two-annas 10 dams. In the conveyance of the 10 dams to Kabir it is recited that the milkiat and mokurari of Amirul Fatima is transferred. The respondents had to say that the words “mokurari right” here do not mean, as they usually do, the right to hold the mokurari, but mean the right to receive the rent from the mokuraridar. The 10 dams which Latifan, Kabir's sister, sold to Mohur Singh were said to be free from the mokurari inasmuch as full price was paid. The remaining two-annas 10 dams inherited by the brother and sister from their mother Pairan were now in the hands of the brother Kabir, and the contention is that the mokurari attached to 10 dams out of this two-annas 10 dams held by Kabir. The other 10 dams to which the mokurari attached passed, the respondents say, to Sharifan, who, it will be remembered, purchased equal shares with Pairan under the sale-certificate of the year 1863. Tamizan is the widow of

Kabir and Kabir's two-annas 10 dams were inherited by Tamizan and by the children of Kabir. The plaintiffs have derived their title from these persons.

The respondents contend that they have been able to show that 10 dams of the one-anna now held by the plaintiffs were subject to the mokurari. As regards the other 10 dams which the respondents say passed to Sharifan at the execution sale of 1863 subject to the mokurari, the respondents now admit that they have not been able to trace the passage of these 10 dams from the possession of Sharifan to the possession of Kabir. So far as these latter 10 dams are concerned, the respondents admittedly were unable to make out any case upon the facts. I am of opinion that in regard to the other 10 dams the respondents also failed. In the first place there is nothing to show that the one-anna share of Bukhshan which she had given in mokurari passed at the sale in 1863 to Pairan and Sharifan except the note in the sale-certificate above referred to, to the effect that certain persons had objected to the sale on the ground that they held this mokurari, but even if the recital in the sale-certificate were held to prove that a portion of the property sold was subject to this mokurari, it would be impossible to say what portion of the seven annas then sold was so subject, for it is not recited what portion of the seven annas sold belonged to Bukhshan and what to Shah Lal—the joint properties of both were sold. Bukhshan had inherited from the previous owner Galib presumably one-eighth of the entire estate and Shah Lal probably seven-eighths, so that from the commencement of the story there is insuperable difficulty in tracing the one anna subject to Bukhshan's mokurari even as far as Pairan and Sharifan and there are other difficulties at later stages of the story.

Moreover if we are to base our judgment merely on surmises from recitals in documents, it is equally probable that the mokurari attached entirely to the share purchased by Sharifan [see Ex. 20 (a)]. As against the respondents' contention there is the fact that Mt. Tamizan was registered in respect of a 10-dams share as absolute owner in 1878 (Ex. 3), that on 14th May 1884 she obtained a separate account in respect of the 10-dams share, she paid revenue accordingly, and in 1888 sued in this character successfully in

ejection (Exs. 19 and 19A). All this is inconsistent with the respondents' case. I am not satisfied with the evidence offered by the respondents to prove possession of the mokurari. Having regard to their failure to adduce the evidence that might have been adduced, I find that they have not been in possession of it. The respondents then say that the question of the existence of this mokurari has already been decided in the course of a partition suit to which they and the plaintiffs vendors were parties. This partition suit was filed by one Yakub Hussain, one of the cosharers of the mauza, in September 1898. The respondents were cosharer proprietors of the mauza and Mt. Tamizan was also a co-sharer proprietor.

On 5th October 1898 a written statement, purporting to have been filed in that case by Mt. Tamizan, stated that the extent of her proprietary share had been correctly stated in the plaint and that she too desired partition. Three months later, in January 1899, the defendants put in a written statement contesting the suit for partition upon various grounds and incidentally claiming that in addition to their proprietary share, as stated in the plaint, they had held a one-anna mokurari right under defendants 6 and 10, the daughters of Mt. Tamizan. There is nothing to show that this claim to a mokurari was brought to the notice of Mt. Tamizan who was not contesting the suit for partition. The contest was only between Yakub Hussain and the present defendants. The plaintiffs in the present suit say that an issue was framed in that partition suit between the contesting parties upon the subject of the mokurari claim of defendants, who were the contesting defendants in the partition suit and that on 2nd March 1899 the defendants fraudulently caused a petition to be filed on behalf of Mt. Tamizan and her two daughters admitting the defendants' claim to mokurari, that this petition was merely filed and that no order was passed upon it. This petition has never been proved and if the defendants seek to rely upon this admission of the plaintiffs, they can rely upon it only as a whole. Moreover the evidence to the effect that Mt. Tamizan and her daughters were not in fact parties to this petition, whatever it was, has not been rebutted. No evidence has been offered that they were in fact

parties to it and it is the fact that no order was passed on the petition by the Court.

An issue was framed on the subject of the mokurari on 7th August 1901. Yakub Husain, the plaintiff in that suit, who had himself purchased a portion of the share held by Mt. Tamizan, admitted, as it was to his interest to do, that the contesting defendants did hold the mokurari they claimed in the one anna retained by Mt. Tamizan, which had not passed to the plaintiff Yakub Hussain under his recent purchase. The order of the Court was that the issue regarding the mokurari be expunged.

Then followed the judgment of 19th August 1901 directing the partition: In the course of this judgment it is again stated that the issue regarding the one-anna mokurari claimed by the contesting defendants has been expunged. The judgment notes that Mt. Tamizan and her daughter together with the other defendants in the case merely state their own share which means, I take it, that they made no contest. It appears, however, that subsequently when the partition was actually carried into effect, the present defendants were allotted possession not only of their proprietary share but also the mokurari of one-anna which they then claimed to hold under the daughters of Mt. Tamizan. The present plaintiffs made their purchase during the pendency of this partition and they put in a petition before the Court asking to be made parties, but so far as this went, the partition had then proceeded too far. At any rate it is clear in the first place that the question as it now stands did not arise in its present form, for the defendants claimed in that partition suit to hold not under Mt. Tamizan but under her daughters; secondly, the question was not raised in that suit at all except between Yakub Hussain who was seeking partition in that suit and the present defendants, for the present defendants did not put in their claim to the mokurari in that partition suit until three months after Mt. Tamizan and her daughters had put in their written statement saying that they did not contest (the defendants have failed to make out that Mt. Tamizan was aware of the claim of mokurari made in their subsequent written statement); thirdly, the preliminary judgment of the Court in the

partition suit states expressly that the issue was expunged.

No doubt the effect of the final decree for the partition was to give the defendants possession of the one-anna they claimed under the mokurari deed but the defendants have in my opinion entirely failed to make out that Mt. Tamizan or the present plaintiffs had any suitable opportunity of contesting the point. They have also failed to make out clearly that the final decree for partition did not in fact leave the question open. There is at least a suggestion in the Commissioner's report upon which the final decree was based that the question was left open. One thing at any rate is clear: that the question was not expressly decided and in the circumstances above set forth, it is, in my opinion, impossible to hold that a decision might and ought to have been obtained in the previous partition suit by Mt. Tamizan or the present plaintiffs. The result is that in my opinion the defendants failed to make out that the plaintiffs were barred by the rule of res judicata. I have also no doubt that they have failed to prove that Mt. Tamizan made any admission in that partition suit and they have also failed to prove on the facts that mokurari granted by Bibi Bukhshan attached to the plaintiffs' one-anna share.

I have not made a reference to the judgment of the learned Subordinate Judge, because that judgment is of an extremely unsatisfactory nature. The case was a difficult one and the judgment is perfunctory and ill-informed. In the first place he found that the plaintiffs were not in possession of their share, but so far as 10 dams are concerned there can be no doubt about the plaintiffs' possession, for they had been successful in a previous rent suit. That suit related to only 10 dams, it is true, but in view of the plaintiffs' success in respect of the 10 dams there can be no real doubt that the evidence that they are in possession of the remaining 10 dams, is true. Upon the question of res judicata the learned Subordinate Judge has gone wrong because he has not given any consideration to the facts. The result is that the judgment and decree of the learned Subordinate Judge dismissing the suit for partition is set aside and in lieu thereof I direct that it be declared that the plaintiffs are proprietors holding

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possession of one-anna out of 16 annas in the mauza mentioned in the plaint; that the defendants have not the mokurari right in this one-anna which they claim; and that a separate takhta be allotted to plaintiffs in continuity to the takhta allotted to them in the previous partition suit out of the takhta which was allotted to the defendants in that suit under a decree dated 27th June 1907. The case will be remitted to the first Court. The partition will be carried out by a Commissioner under his direction and the case disposed of accordingly. The plaintiffs are entitled to their costs in both Courts.

Atkinson, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 129

CHAMIER, C. J. AND SHARFUDDIN, J.

Phagu Sahu and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 276 of 1916, Decided on 15th November 1916, against an order of Sessn. Judge, Gaya, D/- 9th September 1916.

(a) Criminal P. C. (5 of 1898), S. 4 (b)—“Committal sheet” signed by Superintendent of Salt Department containing necessary details and requesting Magistrate to summon witnesses and try accused is “complaint” under S. 4 (b).

A “committal sheet” signed by a Superintendent of the Salt Department and sent to a Magistrate, setting out the date and particulars of an offence under the Salt Act, the names of the accused persons, and the names of the witnesses, and containing a definite request to the Magistrate to summon the witness and try the accused for the offence set out in the sheet, is a complaint within the meaning of S. 4 (b), Criminal P. C. [P 130 C 1, 2]

(b) Criminal P. C. (5 of 1898), Ss. 200 and 537—Conviction is not bad merely because there was irregularity in application of S. 200.

The failure of a Magistrate to examine a complaint on oath under S. 200, Criminal P. C., before issuing process is an irregularity, but unless it is shown that the accused has in any way been prejudiced by the irregularity, it would be covered by S. 537 and a conviction would not be set aside merely on the ground of such irregularity. [P 130 C 2]

Baikuntha Nath Mitter—for Petitioners.

Manuk—for the Crown.

Judgment.—This is an application by two persons, Phagu Sahu and Chedi Sahu who were convicted by Magistrate of offences under S. 9 (b), Salt Act, 1882, and were sentenced, Phagu Sahu in view of a

previous conviction to six month's simple imprisonment and Chedi Sahu to two months simple imprisonment and a fine of Rs. 500 or one month more. They appealed to the Sessions Judge of Gaya, who confirmed the order of the Magistrate. In this application for revision two grounds have been taken, namely, that the evidence does not justify a conviction and secondly that the Magistrate had no jurisdiction to try the case inasmuch as he failed to examine the complainant. As regards the first ground, it is sufficient to say that there is evidence which, if believed, fully justifies the conviction of the applicants. The evidence is set out at considerable length in the Magistrate's order and is summarised in the Sessions Judge's order. We see no reason for differing from the conclusions which have been arrived at by the two Courts below.

On the second question it was suggested at one time that there was before the Magistrate no complaint at all, that he really took cognizance under S. 190 (c), Criminal P. C., and that therefore the Magistrate ought to have informed the accused that they were entitled to have the case tried by another Court. The case was instituted in the manner which appears to be usual in such cases. What is called a "committal sheet" signed by a Superintendent of the Salt Department was sent to the Magistrate. This sheet sets out the date of the alleged occurrence, particulars of the offence, the names of the accused persons and the names of the witnesses which the prosecution proposes to call, and contains a definite request to the Magistrate to summon the witnesses and try the accused for the offences set out in the sheet. This procedure appears to be authorised by para. 12 of what are described as

"instructions issued by Commissioner of Salt Revenue for the guidance of officers of the Salt Revenue Department."

It is suggested by the learned Government Advocate that these instructions are subsidiary rules made under the R. 64, the rules made by the Governor-General-in-Council. It is unnecessary for us to consider whether the Commissioner had authority to prescribe such a mode of bringing cases before the Courts or whether the so-called instructions are really justified by R. 64 of the rules made by the Governor-General, for there can be no doubt that the committal sheet

is a complaint within the meaning of that word as defined in S. 4, Criminal P. C. It appears to us that on receipt of that complaint the Magistrate should, in compliance with S. 200, Criminal P. C., have examined the complainant on oath before issuing processes. He did not so but issued processes at once. At an early stage of the proceedings the accused pleaded that the Magistrate had no jurisdiction to try the case. It is now suggested that this plea was intended to mean that the Magistrate had no jurisdiction because he had failed to examine the complainant on oath. The record does not bear out this suggestion. It appears that for some other reason the accused intended to plead that the Magistrate had no jurisdiction to try the case. The witnesses for the prosecution were examined and cross-examined at great length. All the witnesses named by the accused were called and examined and cross-examined and there was the fullest possible trial of the case. It has not been suggested that the accused have in any way been prejudiced by the failure of the Magistrate to examine the complainant. The learned vakils for the applicants have been unable to refer us to any case in which a Court has, in similar circumstances, set aside a conviction on account of failure of the Magistrate to examine the complainant and when the complaint was made. On the other hand, we have been referred to two cases in which the Courts declined to set aside the conviction on such a ground as this where the accused was not prejudiced by the failure of the Court to comply with the procedure prescribed. There was no doubt a serious irregularity in the proceedings of the Magistrate but inasmuch as the accused were not in any way prejudiced by that irregularity it would, we think, be wrong to set aside the conviction on that ground. In our opinion the case clearly comes under S. 537, Criminal P. C. The only question which remains is the propriety of the sentences which have been awarded. One of the accused Phagu Sahu had been convicted previously under the same Act of a similar offence and there is certainly no ground for reducing the sentence passed upon him. The other accused Chedi Sahu is the general agent of Phagu Sahu. He has been sentenced to two months' simple imprisonment and to

pay a fine of Rs. 500. Considering the scale on which the operations of the two accused have been carried on, we see on ground for interfering with the sentence passed upon him. This application is dismissed.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 131

JWALA PRASAD, J.

Mohamad Jan and others—Appellants.

v.

Commissioner of Patna and others—Respondents.

Second Appeal No. 3045 of 1911, Decided on 11th December 1916, from decision of Dist. Judge, Darbhanga; D/- 29th August 1911.

(a) Bengal Tenancy Act (1885), S. 29—S. 29 does not apply to case of tenant at fixed rate.

Section 29 applies only to the case of a money rent of an occupancy raiyat and not to that of a tenant at fixed rate. There is nothing in that section or in any other provision of the Act to prevent a landlord or tenant from entering into any agreement whereby the status of the tenant is raised from an occupancy raiyat to that of a tenant at fixed rate, and as a consideration by the tenant for acquiring a higher status the rent is enhanced more than two annas in the rupee.

[P 131 C 2]

(b) Limitation Act (1908), Art. 95—Suit to set aside compromise decree obtained by fraud is governed by Art. 95.

A suit to set aside a compromise decree alleged to have been obtained by fraud is governed by Art. 95, and must be brought within three years from the date of the knowledge of such fraudulent decree.

[P 132 C 1]

Lachmi Narain Sinha—for Appellants.

Fakhruddin—for Respondents.

Judgment.—The appellants in this case are the tenants in respect of a holding of 13 bighas and odd in Mauza Barhampore. The Record of Rights recorded the holding in the name of the ancestor of the appellants, who was entered as a tenant at fixed rate with a rental of Rs. 16. The record was finally published in June 1900. About a year after, in May 1901, the landlord brought a suit for a declaration that the tenant was only an occupancy raiyat and that the rental was Rs. 25-5-6. The suit was decided on the basis of a compromise entered into between the parties, whereby the status of the tenant was declared to be that of a tenant at fixed rate and the rental was fixed at Rs. 25-5-6. This

compromise decree is dated 8th July 1901. The estate of the landlord subsequently came under the Court of Wards of the District of Patna.

In 1905 a certificate for arrears of rent was issued and enforced against the tenant. The tenant, that is the ancestor of the appellants, brought a suit, out of which this appeal arises, in the Court of the Munsif of Patna on 10th July 1909 for a declaration that he was a tenant at fixed rate and that the rental was Rs. 16 as entered in the finally published Record of Rights, and that the compromise decree of July 1901 referred to above was not binding upon him and was null and void. As a result of the above declarations, if found in his favour, the plaintiff prayed that the compromise decree of July 1901 be set aside as having been obtained by fraud. In the plaint it is alleged that the plaintiff came to know of the fraudulent compromise decree on 25th November 1907, on which date it is said the cause of action for this suit arose.

The Munsif decreed the suit of the plaintiff. The landlord appealed to the District Judge, who by his judgment dated 29th August 1911 reversed the decision of the Munsif and dismissed the suit brought by the plaintiff. The appellants, as heirs of the original tenant-plaintiff, have preferred this appeal against the said decree of the District Judge. It is contended on behalf of the appellants that the compromise decree is void, inasmuch as it has contravened the provisions of S. 29, Ben. Ten. Act, in enhancing the rent from Rs. 16 to Rupees 25-5-6, that is, more than two annas in the rupee. In the compromise decree the status of the tenant has been declared to be that of a tenant at fixed rate and the rental has been fixed to be Rs. 25-5-6. The landlord had claimed in that suit that the tenant was only an occupancy raiyat, but by the compromise the status of the tenant has been altered from an occupancy raiyat to that of a tenant at fixed rate. There is nothing in S. 29, Ben. Ten. Act, or under any other provision of the Act, to prevent a landlord or tenant from entering into any agreement whereby the status is raised from an occupancy raiyat to that of a tenant at fixed rate and the rent is altered from Rs. 16 to Rs. 25, that is, more than two annas in the rupee as a consideration by the tenant for acquiring a higher status

in the land. Moreover as by the term of the compromise the status has been declared to be that of a tenant at fixed rate, S. 29 of the Act, which applies only to the case of a money rent of an occupancy raiyat, does not at all apply to this case. Nor does S. 147-A in any way affect the compromise lawfully entered into by the landlord and tenant. There was a dispute between the parties both as to the status of the tenant and the rent payable by him. The parties were at liberty to settle by agreement their dispute in the manner in which they have done in the compromise petition on the basis of which the decree was passed.

The contention on behalf of the respondent in this case is that upon the findings of the lower appellate Court the suit is clearly barred. The suit virtually is a suit to set aside a compromise decree alleged to have been obtained by fraud. The setting aside of the decree is the essence and substance of the action. Hence Art. 95, Lim. Act will apply to this case and the suit should have been brought within three years from the date of the knowledge of the fraudulent decree. No doubt in the plaint this date of knowledge is alleged to be on 8th July 1901. The lower appellate Court has held as a matter of fact that the summons was properly served upon the defendant in the first suit and that the compromise was entered into by him and that actually the defendant was a party to that compromise. The compromise petition is dated 1st July 1901 and the decree was passed on 8th July 1901 on the basis of that compromise petition. The plaintiff in this case, therefore, knew full well of the decree in 1901. Upon these findings of the lower appellate Court it is clear that the suit has been brought more than three years from the date of the knowledge of the fraudulent decree and as such is barred by Art. 95, Lim. Act.

I, therefore, hold that the suit has been rightly dismissed by the lower appellate Court. I dismiss the appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 132

CHAMIER C. J. AND JWALA PRASAD, J.
Rash Behari Singh and others—Applicants—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 22 of 1916, Decided on 5th April 1916, against order of Dist. Magistrate, Shahabad.

Criminal P. C. (1898), Ss. 436, 145, 107 and 144—Complaint to take action under Ss. 107 or 144 or 145 dismissed by Magistrate—District Magistrate has no authority to revise order.

Certain persons applied to a Magistrate to take action against the petitioners under S. 107 or 144 or 145, Criminal P. C. The latter, on receipt of the police report, struck off the proceedings declaring the application to be frivolous and vexatious. The complainant then applied to the District Magistrate for revision, who remanded the case to the Magistrate for proper determination of the question of legal possession under S. 145:

Held: that the District Magistrate had no authority to revise the order of the Magistrate in the matter and could not direct him to take action under S. 145, Criminal P. C: 24 Cal 391, Ref. [P 132 C 2]

Muhammad Hasan Jan — for Petitioners.

Judgment.—On 13th January 1916, Jagnarain Rai and others applied to a Subdivisional Magistrate to take action against the present applicants under S. 107 or S. 144 or S. 145, Criminal P. C. The application was sent to the police for inquiry and report and the police submitted a report on 6th February. Three days later the Subdivisional Magistrate struck off the proceedings, declaring the application to be frivolous and vexatious. Jagnarain Rai and others then applied to the District Magistrate for revision of the order of the Subdivisional Magistrate and the District Magistrate passed the following order:

"The case is remanded to the Subdivisional Officer for a proper determination of the question of legal possession under S. 145, Criminal P. C., after hearing the Government Pleader representing the Collector in this matter. The crops must be attached under S. 145 (4), Criminal P. C., immediately and kept until the disposal of the case. The Subdivisional Officer should issue orders for this at once."

The District Magistrate had no authority to revise the order of the Subdivisional Officer in this matter and certainly could not direct him to take action under S. 145, Criminal P. C. The present case is not unlike that of *Kailash Chandra Pal v. Kunja Behari Poddar* (1). We set aside the order of the District Magistrate as

set out above. All proceedings taken by the Subdivisional Officer under order of the District Magistrate are also set aside.
V.S./R.K. *Order set aside.*

A. I. R. 1916 Patna 133 (1)

ROE AND JWALA PRASAD, JJ.

Ganpati Singh—Plaintiff—Appellant.

v.

Mt. Sachi Ojhain and others—Defendants—Respondents.

Second Appeal No. 3707 of 1914, Decided on 15th November 1916, against decision of Dist. Judge, Darbhanga, D/-11th June 1914.

Receiver—Right of—Liabilities to estate before appointment of Receiver are assets—But Receiver can recover only those that become due after appointment—Payment to proprietor of rent due before appointment of Receiver is sufficient discharge of debt.

All liabilities to an estate prior to the date of the appointment of a Receiver constitute assets, but the Receiver is entitled to collect only those assets of the estate that become due to the estate after the date of his appointment. Rent due to the estate prior to the appointment of a Receiver is not part of the estate in the hands of the Receiver and, therefore, a payment to the proprietor on account of such liability is a sufficient discharge of the debt.

Atul Krishna Ray—for Appellant.

Judgment.—The only point that arises in this case is whether rent due prior to the appointment of a Receiver is part of the estate in the hands of the Receiver, or whether the proprietors themselves can sue. We are of opinion that all liabilities to the estate prior to the date of the appointment of the Receiver constitute assets which had rightly fallen into the hands of the original proprietor. A payment to the proprietor on account of such liability would, in our view, be a sufficient discharge of the debt. The Receiver is entitled to collect only the assets of the estate that would become due to the estate after the date of his appointment. We, therefore, remand this case for a decision on the merits. The court-fee paid in appeal will be refunded.

There has been no appearance on behalf of the respondents. We, therefore, make no order as to costs of the proceedings in this Court.

V.S./R.K.

Case remanded.

A. I. R. 1916 Patna 133 (2)

Full Bench

CHAPMAN, MULLICK AND ATKINSON, JJ.
Manik Ram Ahir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 351, 352 and 353, of 1916, Decided on 20th December 1916, against order of Sess. Judge, Manbhum, D/-5th August 1916.

(a) Interpretation of Statutes—Interpretation clause should be used to interpret ambiguous and not plain terms.

The interpretation clause contained in most modern Statutes should be used for interpreting words which are ambiguous or equivocal only, and not so as to disturb the meaning of such as are plain. It is not to be construed as a positive enactment. [P 134 C 2]

(b) Assam Labour and Emigration Act (1901), S. 2 (1) (e)—Cl. (1) (e) is merely descriptive and has nothing to do with intention of person recruited.

Sub-Cl. (e), sub-S. (1), S. 2, Assam Labour and Emigration Act is merely descriptive of what emigration may mean, and is intended to avoid repetition in the main provisions of the Emigration Act of the various points of departure and destination to and from which it was desired to restrict emigration. This description or interpretation has no concern with the mind of the emigrant or whether the emigration was intentional on the part of the emigrant or otherwise. [P 135 C 1]

There is nothing in S. 2, sub-Cl. (e), to indicate or to show that in order to constitute emigration there must be personal intention present to the mind of the person recruited, when he is recruited, to go to a labour district to work there for hire. [P 135 C 1]

(c) Assam Labour and Emigration Act (1901), S. 2 (1) (e)—Emigration—Definition of.

In order to constitute emigration within the meaning of the Act all that is necessary is that (a) the points of departure and destination should be as required by the Act; (b) that the emigrant should be 16 years of age or upwards; and (c) that the emigrant is to labour for hire in a labour district otherwise than as a domestic servant. [P 135 C 2]

(d) Assam Labour and Emigration Act (1901), S. 164—Ingredient of offence under S. 164 stated.

To constitute an offence under S. 164 of the Act the recruiter must have present to his mind in the exercise of his powers the purpose for which he recruits, viz., emigration. It matters not that the individual recruited intended to emigrate: A. I. R. 1916 Pat. 81 and 37 Cal. 27, Dist. [P 135 C 2]

Hasan Imam and *Uma Charan Laha*—for Petitioner.

Sultan Ahmad—for the Crown.

Atkinson, J.—In each of these three cases the petitioner has been convicted under 164, Assam Labour and Emigration Act, 1901. The facts found in each case are similar. The petitioner has a depo

in the District of Sambalpur to which the provisions of the Act have been extended. To this depot the persons in respect of whom the offences are said to have been committed were brought. They were given to understand that they were being taken to Chittagong. Under the Superintendence of the petitioner arrangements were made to send them as labourers to Assam. After leaving the petitioner's depot but before leaving the District of Sambalpur they became aware that they were going to Assam and not to Chittagong. On these findings the petitioner has been convicted under S. 164 of the Act. S. 164 runs as follows:

"Whoever knowingly recruits, engages, induces, or assists or attempts to recruit, engage, induce, or assist any person to emigrate in contravention of the provisions of the Act or any notification for the time being in force thereunder shall be punishable with imprisonment for a term not exceeding six months and with a fine not exceeding Rs. 500 or both."

In this case admittedly the recruiter acted without a license, which is the act alleged to be in contravention of the Statute. If the case rested alone upon the construction to be put upon this section with a view to ascertaining its scope, meaning and object and the nature of the offence it created, the case submitted for our determination would be reasonably free of doubt and difficulty. However, it is contended that having regard to S. 2, sub-S. 1, Assam Labour and Emigration Act of 1901, the words "to emigrate" as used in S. 164 have a peculiar and significant meaning; and that by reason of the interpretation given to the word "emigrate" in S. 2, sub-S. 1, of the Act the words "recruits to emigrate" as used in S. 164 are not to have their ordinary and grammatical sense in accordance with the context in which they are used in that section coupled with the scope and object of the section itself. Shortly summarised, the contention before us is that to sustain conviction in each case it is necessary to find that at the time when the petitioner assisted the coolies to leave Sambalpur the coolies had the intention of going to Assam to labour, and that the petitioner knew that the coolies had that intention. The judgment of this Court in the case of *Manik Ram Ahir v. Emperor* (1) is relied on to support this contention.

Let us examine carefully S. 2 of the Statute; bearing in mind that most modern Statutes contain an interpretation clause wherein is declared the meaning which certain words and expressions are to, or may bear for the purposes of the Statute in question. As a rule, however, it should be used for interpreting words which are ambiguous or equivocal and not so as to disturb the meaning of such as are plain. Interpretation clauses are not to be construed as positive enactments. S. 2 begins by enacting that "in this Act unless there is anything repugnant in the subject or context," certain words are to have a certain meaning and sub-Cl. (e) sets out that the word "emigrate" denotes the departure of any native of India, not being a native of a labour district, of the age of sixteen or upwards from any part of the territories in which this Act may for the time being be in force for the purpose of labouring for hire in a labour district otherwise than as domestic servant. Thus if there was any repugnance between the meaning of the word "emigrate" as defined in the interpretation section with the subject or context in S. 64 we should have to modify the meaning accordingly, having regard to the scope and object of the section and the evil the law intended to prevent. We should not, by adopting a forced and unnatural interpretation of the words "recruits to emigrate," render the section a nullity; and we cannot adopt a construction which would lead to an obvious absurdity and be inconsistent with the general policy and scope of the legislative enactment itself. The provisions in the Act on the subject of emigration relate to the engagement of emigrants through garden sirdars, the regulation of transport, medical supervision, inspection, repatriation and so forth. It is obvious that it is the intention that these provisions should apply quite irrespective of the question whether the emigrant happens to know where he is going or not. The House of Lords in the case of *Vacher and Sons, Ltd. v. London Society of Compositors* (2), laid down the guiding rule for the construction of Statutes and Lord Macnaghten at p. 117 of report says that "it is the universal rule in construing statutes that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in

1 A I R 1916 Pat 81=38 I C 316=1 P L J 388.

2. (1913) A C 107=82 L J K B 282.

which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further."

And again at p. 121 of the same report another noble Lord says:

"It is no doubt well established that, in construing the words of a Statute susceptible of more than one meaning, it is legitimate to consider the consequences which would result from any particular construction, for as there are many things which the legislature is presumed not to have intended to bring about, a construction which would not lead to any one of these things should be preferred to one which would lead to one or more of them."

But apart from this view of the case S. 2, sub-S. 1, Cl. (e), is not really a definition section at all. The word "denotes" is only used in sub-Cl. (e). In all the other sub-clauses of S. 2, the word "means" is used in contradistinction to the word "denotes." We attach importance to this distinction, because we think it clearly indicates that sub-Cl. (e), S. 2, does not purport in the strict sense to be a definition of the word "emigrate" and, therefore, cannot be construed in too literal and strict a sense as if it were a positive enactment. In our opinion sub-Cl. (e), sub-S. 1, S. 2, is merely descriptive of what emigration may mean and is intended to avoid repetition in the main provisions of the Act of the various points of departure and destination to and from which it was desired to restrict emigration, viz., departure from Sambalpur for Assam. This description or interpretation had obviously no concern with the mind of the emigrant or whether the emigration was intentional on the part of the emigrant or otherwise. And in order to constitute emigration, in our opinion, within the meaning of the Act all that is necessary is that: (a) the points of departure and destination should be as required by the Act; (b) that the emigrant should be 16 years of age or upwards; and, (c) that the emigrant is to labour for hire in a labour district otherwise than as a domestic servant. Much stress has been laid upon the words "for the purpose" used in sub-Cl. (e), S. 2, as implying a personal intention in the mind of the individual recruited to go to a labour district and work as a labourer otherwise than as a domestic servant. We are not prepared to put a strained construction upon these words which the general scope of the Statute and the section do not themselves warrant. We have already indicated the meaning which we think the words "recruits to emigrate" bear in

the context in which they are used in S. 164 and applying the ordinary canon of construction, viz.,

"that a reasonable construction should, if possible, prevail and that it must not be assumed that the legislature foresees every result which may accrue from the use of a particular word",

we consider that there is nothing in S. 2, sub-Cl. (e), to indicate or show that in order to constitute emigration there must be personal intention present to the mind of the person recruited, when he is recruited, to go to a labour district to work there for hire. Therefore, whether S. 2, sub-Cl. (e), be viewed in the light of its repugnance to the scope and meaning of S. 164, which deals with offences by recruiters or upon its natural construction, the argument addressed to us on behalf of the petitioner fails. With all respect to the learned Judges who decided the case of *Manik Ram Ahir v. Emperor* (1), we are unable to agree with the view which they took of the section and it can no longer be regarded as an authority for the construction of S. 164. The decision of Coxe and Mullick, JJ., in the Calcutta High Court in August 1913 (unreported) supports our view. The case of *Faiz Ali v. Emperor* (3) rightly understood has no application to the present case and is not in pari materia with it, and thus affords no assistance in the present argument. It follows, therefore, that to constitute an offence under S. 164 of the Statute the recruiter must have present to his mind, in the exercise of its powers, the purpose for which he recruits, viz. emigration. It matters not that the individual recruited intended to emigrate. If the recruiter secures his services with the intent that he should emigrate, the intention on the part of the person induced is immaterial.

Once the Tribunal who hears the case finds as a fact that the recruiter intended that the labourer he secures or recruits should depart to a labour district as a labourer to work in such district, the offence is complete within the meaning of the section and the intention of the person induced is wholly immaterial. Argument has been addressed to us on the severity of the sentences in this case. In Revision No. 353 of 1916 a punishment of three months' rigorous imprisonment and a fine of Rs. 500 was pronounced. We think that sentence should stand. In Revision No. 352 of 1916 a sentence of

six months' rigorous imprisonment was awarded to the petitioner. We think in this case the punishment is somewhat severe and we reduce the period of imprisonment to one of three months. In Revision No. 351 of 1916 the punishment awarded was six months' rigorous imprisonment. In this case also we think that the punishment is somewhat severe and we reduce the sentence to a period of three months. Thus in all the petitioner will undergo three consecutive periods of imprisonment of three months each making in all nine months, coupled with his liability to pay a fine of Rs. 500 in Revision No. 353 of 1916 and in default of payment to undergo rigorous imprisonment for a further period of six weeks.

Chapman, J.—I concur.

Mullick, J.—I concur.

V.S./R.K.

Petitions rejected.

A. I. R. 1916 Patna 136

ATKINSON AND JWALA PRASAD, JJ.

Gaya Loan Office, Ltd.—Plaintiff—Appellant.

v.

Awadh Behari Lal—Defendant—Respondent.

Second Appeal No. 1356 of 1915, Decided on 14th June 1916, from decision of Sub-Judge, Gaya, D/- 10th April 1914.

Civil P. C. (1908), S. 149—Plaint insufficiently stamped but filed within limitation—Deficiency made up after period of limitation and accepted by Court—Suit is filed in time.

The plaint in a suit was filed within limitation but was insufficiently stamped. The deficiency in the Court-fee was made up after the expiry of the period of limitation, but was accepted by the Court:

Held: that the suit must, under S. 149, Civil P. C., be taken to have been instituted on the date on which the plaint was originally filed: 29 All 749, Ref. [P 137 C 2; P 138 C 2]

Ganesh Dutt Singh—for Appellant.

Kulwant Sahay—for Respondent.

Atkinson, J.—This action was brought on foot of a note of hand dated 27th June 1911. The principal sum secured by the note of hand was the sum of Rs. 468. The defendant made no payment, either by way of principal or interest, at any time on foot of this note up to the 27th June 1914. The plaintiff, on the 27th June 1914, instituted the present suit to recover Rs. 636 by way of principal and interest. The court-fee payable on the amount claimed would be Rs. 48. As a matter of fact the court-fee was only

paid to the extent of Rs. 10. The matter was immediately detected by the officer of the Court on the same day that the plaint was filed, and the learned Munsif, on the information as to the deficiency of the court-fee being conveyed to him by the officer of the Court, directed the pleader who filed the plaint to be informed of the fact. On 6th July the pleader on behalf of the plaintiff lodged the amount of the deficiency, Rs. 38, whereupon the learned Munsif, being informed of this, directed that the matter should be put up in the presence of the pleader for the necessary orders; and accordingly on the 18th July the matter was put up and the Munsif made the following order:

"Heard the pleader for the plaintiff; register the plaint. The legal question of limitation will be gone into at the time of trial."

On the same day he made the following order:

"Register the plaint and issue summons to the defendant, fixing 12th August 1914 for final disposal."

Now, it is contended that the 27th day June 1914 was the last available day within which the plaintiff could bring this action so as to be entitled to maintain the suit, otherwise it would be barred by limitation of time. It is contended that because the plaint that was filed on 27th June was insufficiently stamped with the proper court-fee, that, therefore, the suit cannot be said to have been instituted on 27th June, but at some later date, and that thus the plaintiff's cause of action is barred by limitation of time. The learned Munsif, before whom this case came in the first instance decreed the suit in favour of the plaintiff for the full amount of his claim. The learned Subordinate Judge on appeal has reversed the finding of the Munsif, and has held that in point of law the plaintiff's claim is barred by limitation of time, inasmuch as it cannot be considered that the suit was instituted on 27th June 1914. The view of the learned Judge is based mainly on the interpretation which he gave to the first order made upon 18th July. Prior to 1908 there was a conflict of authority as to what the result was when a plaint was filed and insufficiently stamped, or where a plaint was filed after time allowed. Various Courts took different views, and the intention of the legislature was, by S. 149, Civil P. C., to set at rest the doubts created by the conflicting decisions prevailing in Alla-

habad and in Calcutta; and as I take it, S. 149 was intended to favour the construction put by the Courts in Allahabad upon the interpretation of the old section, which was S. 582 of the former Code. Now, S. 149 has clearly expressed in terms:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees, has not been paid the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee: and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

That section gives wide discretionary powers to the Court, and expressly provides that at any stage the Court may allow the whole or part of the fees payable to be paid, and upon payment the document shall have the same force and effect as if the fee had been paid in the first instance. In the case of *Hari Ram v. Akbarh Hussain* (1), at p. 760 of the report, I think the learned Knox, J., enunciated the true principle by which the Courts should be guided. No doubt, the case was a decision before the last Civil Procedure Code Act, and at p. 760 he says:

"When the plaint, whatever its defects, is presented to the proper officer, the suit is then and there instituted, and once it has been instituted within the time prescribed, the suit escapes from the bar of limitation, unless such bar be one in existence prior to institution."

This point, though not quite the same, came before the learned Chief Justice of this Court and Sharfuddin, J., in Appeal No. 2210 of 1914. In that case the learned Munsif allowed ten days to the plaintiff to file the amount of the deficiency of the court-fee. The plaintiff failed to pay the court-fee within the time allowed, but paid it nearly ten days later. The learned District Judge, on appeal, held that as the payment of the court-fee was not made within the time allowed by the Munsif, it could not be made after, and that the suit was consequently barred. The learned Chief Justice and Sharfuddin, J., reversed that decision, and held that once the court-fee was paid after the time allowed by the order of the Munsif and was accepted, the entire proceeding was in order, and the plaint must be treated as if the full fee had been paid in the first instance; and accordingly they

1. (1902) 26 All 749.

held that no question of limitation arose in the case whatsoever, and the case proceeded. Now, much argument has been addressed to us as to the terms of the order of the 18th July. In fact, the learned vakil for the defendant has based his entire argument in support of the lower appellate Court's decision on the wording and phraseology of that order.

He says that it is but a conditional granting of leave to file the plaint. I think that argument is unsound. The Court of the Munsif had been fully informed between the 27th June and the 6th July, when the deficiency was paid, of each step that had been taken, and when the necessity arose of making any compulsory order upon the plaintiff or his vakil to make good the deficiency of the court-fee, the learned Munsif became aware and was informed by the officer of the Court that on the 6th July the money had been paid, and the Munsif directed the matter to be put up for the necessary order, and on the 18th he says in express terms: "Register the plaint." I dare say some suggestion was made by the learned vakil for the opposite side that some question of limitation would arise, and the learned Munsif, to safeguard the rights of the defendant, introduced this tag into his order, in case the effect of his decision might be to bar the defendant in pleading limitation of time as a defence to this action. The order to register the plaint was, in my view, a mandatory direction by the Court, and an unequivocal act recognizing the validity of the payment, and thereupon the plaint became, under S. 149, of full force and effect as from date the 27th June. I am fortified in that interpretation of the first order of the 18th July by the express phraseology of the second order of the same day "Register the plaint and issue summons to the defendant." This second order has no limitation or reservation.

I think it is clear that the learned Munsif exercised his discretion within the meaning of S. 149 and that he exercised his discretion in recognising the validity of the payment that was made. That being so, the plaint in this case must be deemed in point of law to have been filed on 27th June 1914 and, therefore, the cause of action was within time. For these reasons, I am of opinion that the learned Subordinate Judge was wrong in the conclusion at which he arrived in

point of law, and accordingly we allow this appeal, and we restore the order of the Munsif, with costs in the lower appellate Court and costs of this appeal.

Jwala Prasad, J.—The question as to whether or not this appeal is barred by limitation must, in my opinion, be answered in the negative. The suit was instituted on 27th June 1914, within the time prescribed for instituting a suit under the law of limitation. The plaint, however, was insufficiently stamped. Under O. 7, R. 11, Civil P. C., Cl. (3), the plaint might have been rejected by reason of the failure of the plaintiff to pay the requisite stamp-fee within the time allowed by the Court, if any such time had in fact been fixed. The omission to pay the full court-fee was detected on the very day that the plaint was filed. The Court did not fix any time within which the deficiency was to be paid. The Court directed information of the deficiency in the stamping of the plaint to be given to the pleader of the plaintiff, and upon being informed of the deficiency, the learned vakil for the plaintiff paid the proper and necessary fee on 6th July 1914. On 18th July 1914, the Court ordered the plaint to be registered and summonses to be issued and served upon the defendants. The order made by the Munsif in the case on 18th July to register the plaint and to issue summonses to the defendants was required by O. 5, R. 1, Civil P. C., when the plaintiff had complied with all the necessities of O. 4, read with O. 7, referable to the institution of suits. By the order of 18th July 1914, the Court clearly, in my opinion, had accepted the plaint as being properly stamped and directed the same to be registered.

The Court not having fixed any time for the payment of the deficient court-fee and not rejecting the plaint on the date when the deficient court-fee was paid, or subsequently, naturally led the plaintiff and his advisers to believe that the plaint was properly filed and that the suit was properly instituted. There was no laches on the part of the plaintiff. If there was any error, it was an error of the Court in not passing on the first day the necessary order required by O. 7, R. 11. Under these circumstances the plaintiff ought not to suffer. There is no doubt that S. 149 of the present Code has settled antecedently conflicting views as to the law on the interpretation of S. 582A of

the old Code, but now under the existing Code if deficient court-fee be paid within the time permitted by the Court, it will have retrospective effect and validate the plaint as from the date when the suit was instituted. It has been held recently by this Court that payment of a deficient court-fee, even after the time fixed by the Court, has the same effect. Therefore, in the present case if the limit was fixed by the Court for the payment of the deficiency in the court-fee and the fee was paid within the time allowed, and even beyond the time if the payment was accepted by the Court, the plaintiff's suit would not have been barred. The suit surely cannot be dismissed when there was no time fixed by the Court and the plaintiff paid the deficit court-fee within a reasonable time after notice of the deficiency and the Court accepted the payment. I agree with the views expressed by my learned brother, and in the order that the appeal should be decreed, the judgment of the learned Subordinate Judge reversed and the order of the Munsif restored with costs in the lower appellate Court and this Court.

V.S./R.K.

Appeal decreed.

A. I. R. 1916 Patna 138

CHAMIER, C. J. AND SHARFUDDIN, J.
Babua and others—Defendants—Appellants.

v.

Mt. Sarli—Plaintiff—Respondent.

Letters Patent Appeal No. 41 of 1916, Decided on 11th July 1916, against the judgment of Mullick, J., D/- 10th May 1916; is S. A. No. 1649 of 1915.

Bengal Tenancy Act (1885), S. 153—Rent suit—Question of title decided by lower Courts—Second appeal is not barred.

Plaintiff claiming to be raiyat on the land in suit sued defendants for rent alleging that they were her under tenants. The suit was valued at less than Rs. 100. The defendants denied that they were under tenants and set up a title as raiyats pleading that plaintiff had no right to institute the suit. Both the lower Courts held the plaintiff's allegations established and decreed the suit:

Held: that a second appeal to the High Court was not barred by S. 153, Ben. Ten. Act, inasmuch as the lower Courts had decided a question of title to land between parties having conflicting claims thereto. [P 139 C 1,2]

Saroshi Charan Mitter—for Appellants.

Rajendra Prasad—for Respondent.

Mullick, J.—One Nawaz had a holding of ten bighas odd. The husband of the plaintiff was one of the sons of Nawaz

who predeceased his father. The defendant was admittedly an under-raiyat under Nawaz in respect of the holding now in suit measuring 18 cottas odd, and claims to have purchased raiyati interest in this area from Palak, the son of Nawaz's brother. The plaintiff now sues the defendant for the rent of the under raiyati holding. The cadastral survey record shows the defendant to be an under raiyat of Nawaz. The defence is that the defendant has by his purchase acquired the raiyati interest and is, therefore, not liable to pay rent to the plaintiff. An issue was raised as to whether the relationship of landlord and tenant exists and the Munsif came to the conclusion that the plaintiff was put in possession of the lands by Nawaz for her maintenance, that Palak had never been in possession and that the plaintiff was entitled to the rent claimed. The learned Subordinate Judge has come to the same finding. It is clear that as between the defendant and the plaintiff there were conflicting claims to the raiyati interest and although the decree is under Rs. 100, a second appeal would under S. 153, Ben. Ten. Act lie if there has been a decision on the question of title between the parties. But, in my opinion, there has been no such decision. It is difficult to understand upon what basis it was held that the defendant was liable to pay the rent claimed to the plaintiff.

The plaintiff set up a gift, but that gift has not been proved. The defendant set up a purchase from Palak, but the genuineness of that purchase has not been decided. Mere possession by the plaintiff does not seem to be a valid reason for holding the defendant liable for rent. But although the lower Court's decree seems to me to be wrong, I cannot upon the findings of the Court say that there is any second appeal. The Court has made a mistake but as it has not decided the question of title, no second appeal lies. A decision by implication is not sufficient. The effect of the decree is that the plaintiff is entitled to get rent for the years in suit from defendant. The question of title, in my opinion, is not *res judicata*. No second appeal, therefore, lies and the preliminary objection advanced by the learned Vakil for the respondent must succeed. The appeal is dismissed with costs.

Chamier, J.—This is an appeal under S. 10, Letters Patent, against a judgment of Mullick, J., It arises out of a suit

brought by the respondent for rent of two small plots of land. The respondent claimed to be raiyat of the land and she alleged that the defendants are her under-raiyats and liable to pay rent to her. The appellants denied that they were under-raiyats of the respondent and pleaded that she had no right to institute the suit. They alleged that their father had purchased the land in 1898 from one Palak, the nephew and heir of one Nawaz, who was, according to the case of both parties, formerly raiyat of this land. Both the Munsif and the Subordinate Judge held definitely that the respondent's allegations had been established, that whether or not Palak was the legal heir of Nawaz, it had been proved that the respondent stepped into the shoes of Nawaz who was her father-in-law and had been in possession of his land, including the land now in question, for a large number of years. Both Courts held definitely on the evidence that the appellants had failed to prove that they ever held this land as raiyat of the landlord. A second appeal to this Court was dismissed by Mullick, J., on the ground that a second appeal was barred under S. 153, Ben. Ten. Act. It seems to me that the Courts below decided a question of title to land between parties having conflicting claims thereto and that a second appeal did lie to this Court. The case indeed seems to be covered by authority, but, in my opinion, the appeal to this Court ought to have been dismissed on the ground that both Courts below held definitely on the evidence that the present respondent had proved that she had been in possession of the land as raiyat since at least 1304 fasli and was, therefore entitled to recover rent from the appellants. I would therefore, dismiss this appeal with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

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JWALA PRASAD, J.

Ghasita Singh—Appellant.

v.

Mt. Bhagmani Koer and another—Respondents.

Second Appeal No. 591 of 1916, Decided on 5th December 1916, against decree of Sub-Judge, Arrah, D/- 14th March 1916.

Ejectment—Suit for—Onus is on plaintiff to prove his title.

In a suit for ejectment a plaintiff must succeed on the strength of his own title and cannot rely upon the weakness of the defendant's title.

[P 140 C 2]

Sarat Chandra Mukerji—for Appellant.

Tribhuwan Narain Sahai—for Respondents.

Judgment.—This appeal arises out of a suit brought by the appellant for declaration of his title to and for recovery of possession over a house. The house in dispute belonged originally to one Lila Sonar. He sold it to Mt. Pooyia on 20th March 1893, by a registered sale-deed. The plaintiff alleges that Mt. Pooyia had purchased the house out of the funds of her father Hardeyal and not out of her husband's money, and that he purchased the house from Mt. Pooyia by a kobala dated 2nd January 1912. The plaintiff alleged that defendant 1 is occupying the house as a tenant of the plaintiff on a rent of 4-annas a month and had no right to the house beyond that of a tenant and that after the death of Mt. Pooyia defendant 1 is asserting her own claim to the house and is refusing to vacate it. Mt. Pooyia was the widow of one Madho Sonar. Mt. Bhagmania, defendant 1, is the second wife of the said Madho Sonar. Defendant 2, Ram Dass Sonar, is the minor son of Madho Sonar by his second wife defendant 1. They are in possession of the house.

On the above allegations the plaintiff brought this suit in the Court of the Munsif of Sarsaram to recover possession of the house from the defendants. The defendants resisted the claim of the plaintiff on the ground that the house in dispute did not belong to Mt. Pooyia, the vendor of the plaintiff, that it was purchased by Madho Sonar with his own funds in Pooyia's name and that Mt. Pooyia had no right to sell the house to the plaintiff and the plaintiff's kobala of 2nd January 1912 was executed without any consideration. The defendants further claim to be in possession of the house as heirs of Madho Sonar. The Munsif decided issue 7 against the plaintiff. This issue is:

"Whether the kobala dated 2nd January 1912, in favour of the plaintiff is made for consideration or not, and whether it was good and binding or not."

The learned Sub-Judge in appeal has accepted this finding of fact of the first

Court and it must be accepted as conclusive by this Court in second appeal. The plaintiff has therefore, failed to prove his title based on the sale-deed of 2nd January 1912 executed by Mt. Pooyia, and cannot succeed in a suit for recovery of possession. It is, however, argued that as the first Court has held that Mt. Pooyia was not the benamidar of Madho Sonar, the husband of Mt. Pooyia, the plaintiff's vendor, which finding has not been rebutted by the learned first appellate Court, the property in dispute was the stridhan of Mt. Pooyia and hence the defendants have no right in the property as not being the heirs to the stridhan of Pooyia. This contention is unsound. In the first place the findings of the Munsif do not warrant a conclusion that the property in dispute is the stridhan of Mt. Pooyia. The Munsif held that the consideration money of the kobala was paid by Madho Sonar, the husband of Mt. Pooyia, and not by Mt. Pooyia or her father Hardeyal, as alleged by the plaintiff. The fact that Mt. Pooyia was not the benamidar of Madho Sonar does not go to show that it was the stridhan of Mt. Pooyia. It is neither the case of the plaintiff nor is there any finding of fact that the money with which the property was purchased, or that the property purchased, was given as an absolute gift to Mt. Pooyia by her husband. All that the Munsif says is that

"it is undisputed law that a husband's gift of immovable property to a wife does not make the said property to be her stridhan."

This is a statement of law about which the Munsif may be right or wrong. But there is no finding anywhere that there was any absolute gift to the wife. The house was purchased by Mt. Pooyia with the money of the husband. She is dead. The house has, therefore, been inherited by the defendants, the widow and the son of Madho Sonar, and they are rightly in possession of the same. In the second place, even if it be stridhan of Mt. Pooyia the plaintiff, who does not claim to be the heir of Mt. Pooyia, cannot evict the defendants, howsoever weak their title to the property may be. In a suit for ejectment the plaintiff must succeed on the strength of his own title and cannot rely upon the weakness of the defendant's title. It has concurrently been held by both the Courts below that the plaintiff

has failed to prove his title based on the kobala set up by him. The suit has been rightly dismissed. The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

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SHARFUDDIN AND MULLICK, JJ.

Jagarnath Prasad and others—Plaintiffs—Appellants.

v.

Jaikishun Prasad and others—Defendants—Respondents.

First Appeals Nos. 242 to 244 of 1913, Decided on 22nd March 1916, from decision of Offg. Sub-Judge, Darbhanga, D/- 19th March 1913.

(a) **Hindu Law—Gift—Female—Gift to female excepting widow—Absolute estate will be presumed to be conveyed—No presumption that female cannot take absolute interest.**

In the absence of words of limitation, gifts to woman in Hindu law, with the exception of a widow, must be presumed to convey an absolute interest, unless there is something repugnant in the context: 32 Cal 105; 24 W R 3951; 24 Cal 646 and 16 Mad 466, Ref. [P 144 C 1, 2]

There is no presumption that a Hindu woman, other than a widow, is incapable of taking anything more than a life-interest. [P 144 C 2]

(b) **Hindu Law—Will—Absolute estate—Bequest of absolute estate to female—Repugnant conditions would be invalid.**

Where the main purpose of a will is to bequeath an absolute estate of inheritance to a Hindu woman, terms which purport to create a perpetuity or to impose restraints on alienation repugnant to the estate created are inoperative and the will is otherwise valid. [P 142 C 1; P 144 C 1]

(c) **Evidence Act (1872), S. 115—Estoppel by silence or misrepresentation when arises stated.**

Under S. 115, Evidence Act, an omission to give certain information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts; there can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of his preceding declaration. This section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement: *Gregg v. Wells*, (1839) 10 A D & E 90 and 6 C L J 601, Dist. [P 142 C 2]

(d) **Hindu Law—Will—Per Mullick, J.—Bequest of income only creating perpetuity is invalid.**

Per *Mullick, J.*—A bequest only of the income of a property creating something in the nature of perpetuity must be, and is, void under the Hindu law: 11 Cal 684 (P C), Foll. [P 144 C 1]

(e) **Hindu Law—Alienation—Widow—Necessity—Payment of debt incurred for family business is necessity.**

A Hindu widow can alienate property for the payment of debts incurred in the management

of a business which forms part of the family estate. 21 All 71 (P C), Ref: [P 144 C 2]

Pugh, K. P. Jayaswal, and Baldeo Narayan Singh—for Appellants.

Rash Behari Ghosh, Purnendu Narayan Sinha, Fakhruddin and Dwarkanath Mitter—for Respondents.

Sharfuddin, J.—These are three appeals, namely, Nos. 242, 243 and 244 of 1913, arising respectively out of suits Nos. 340, 338 and 339 of 1911. In all the three suits there are the same plaintiffs. Plaintiff 1 is the son of a lady named Sahodra Bibi and plaintiffs 2 and 3 appear to be speculative purchasers from plaintiff 1 with regard to 7 annas of the interest that plaintiff 1 may be held to be entitled to. The defendants in the three suits are purchasers from Sahodra Bibi herself. The plaintiffs' suit is that Sahodra Bibi had only a life-interest under a will executed by Fateh Chand on 25th Chet 1255 Fasli and that as only a life-holder she had no right to alienate the properties, which, are the subject of the suits, by conveying to the defendants an absolute interest in those properties. The will in question is to be found at p. 41 of the paper-book in appeal No. 243. A translation of the will has also been given by the Subordinate Judge in his judgment. It appeared that one Fateh Chand, who was a wealthy banker and landlorder having an extensive business and dealings with other firms, had his principal place of business in Patna, but he had a branch at Muzafferpur as well. He was an old man without any issue. He made a will as already observed, by which he gave some interest to his widow Mt. Sheodei, but the interest so given to her was no doubt a limited interest because we find in the will the testator stating that Mt. Sheodei held the properties *tahin-i-hayat*, that is to say, during her life-time. Sahodra Bibi was a daughter of the testator's brother Sakhi Chund. It appeared that Sahodra Bibi from her infancy was brought up by the testator. He also celebrated her marriage at his own cost. He has made a certain provision for this niece of his and the question for the purpose of the present appeal is, as to whether the estate given to Sahodra Bibi was an estate only for life or an absolute and heritable estate. There can be no doubt that the testator had affection for Sahodra Bibi, because we find that when making a provision for his widow Sheodei he

enjoined Sheodei to make over a sum of a lakh of rupees to Sahodra Bibi for her maintenance.

The disposition made in the will is to the following effect, that if a son or a daughter will be born to the testator that son or daughter will be the malik of the whole property, moveable, and immovable and if no son or daughter be born then his niece Sahodra will get one lakh of rupees from Mt. Sheodei upon which Sahodra will maintain herself. Then after Sheodei's death Sahodra will get the balance of the properties; but while making a provision for Sahodra it is important to note that there is no limitation or restriction by restricting her estate to her life-time. It seems to me that at the time of the execution of the will there were two ideas prominent in the mind of the testator. First, to perpetuate his own name, and second, that the properties left by him should not be transferred in any case. He laid down a condition that even Sahodra Bibi is not to alienate the properties in her possession under the will. But if Sahodra acquired an absolute interest the condition is invalid and she had full authority to alienate any and all of the properties in favour of anybody she liked. The question, therefore, is as to whether the estate given to Sahodra was an estate for life or an absolute estate. From a certain passage in the will it appears to me that the estate given to Sahodra by the testator was an absolute estate, an absolute and heritable estate, because I find it is stated therein,

"if my wife or my niece directly or indirectly, or the latter's heirs born of her womb, deviate from paying the expenses of, and repairing the temples as before, she or they will bring disgrace upon themselves in this world and shall be answerable in the other world."

If the intention of the testator had been to give only a life-interest to his niece there was no necessity of mentioning anything about the heirs born of her womb, and the injunction of keeping the worship and also the repair of the places of worship is one not only to his niece but also to his niece's heirs. It is clear, therefore, from this that the idea in the mind of the testator was that his niece Sahodra should get an absolute title. The Subordinate Judge has also come to the same conclusion. That being so, Sahodra had full authority to convey any portion of the property in her hands to the defendant; on the interpretation that

I give to the will these three suits have been rightly dismissed. Many objections were taken during the course of argument on behalf of the respondents, but for the purposes of the present appeal it is not necessary to discuss those questions, questions which do not form part of the pleadings of the case. It was urged that the plaintiffs were estopped from alleging that the will gave to Sahodra only a life-interest. From the evidence it appears that during the lifetime of Sahodra, and during her management of the business, the business failed with large debts due to other people. On the failure of the business there was a regular clamour among the creditors to adopt means to secure repayment of those debts.

Sahodra's business had no money and the means that were thought of to pay off the debts was by sale of the properties. In the negotiations of the sale Sahodra's son Jagarnath, plaintiff 1, took part, and it is alleged that he induced and persuaded intending purchasers to purchase the properties on the assurance that his mother Sahodra had an absolute interest. It is a proved fact that Fateh Chand was very wealthy. He had businesses in Patna, Muzafferpur and various other places. He was very well known in society; it is not likely that when the creditors went to Muzafferpur to the house of Sahodra and held a meeting there, that they did not come to know that she was holding the estate under a will of her grand-uncle Fateh Chand. I find there is no evidence on the record to show that the purchasers from Sahodra had no knowledge of the existence of the will at the time when they purchased the properties from Sahodra. There can be no doubt that under S. 115, Evidence Act, an omission to give certain information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts; there can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of the preceding declaration. This section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. None of the purchasers examined say that he did not know about the existence of the will, and that he believed the representations made by Jagar-

nath. The next question raised was that the suit was barred by limitation. I do not think that it is necessary to discuss that question after having held that the will gave an absolute interest to Mt. Sahodra, and that being my opinion, the appeals are dismissed with costs.

Mullick, J.—I agree with the result which has been arrived at by my learned brother, and I will deal very shortly with the points which have been argued by the parties before us. It is necessary at the outset to give the salient dates upon which the cases of the parties rest. Fateh Chand's will, that is, the will, in suit, was executed on 13th April 1848. Fateh Chand died either the same year or the following year. Plaintiff 1, Jagarnath, was born in 1852; Sheodei, the wife of Fateh Chand, died in 1853. In 1869 Sahodra executed a power-of-attorney appointing her husband Manohar Lal as her agent. After this year, the firm of which Sahodra was the proprietor and manager, got into difficulties. On 17th June 1884 Sahodra and Jagarnath sold one of the properties left by Fateh Chand to one Banwari Lal. That sale is not disputed in the suits before us. On 24th July 1884, Sahodra made the first of the sales with which we are here concerned, namely, the sale to Domi Lal, the father of Bisheshar, the principal defendant in Suit No. 339, out of which arises Appeal No. 244. That deed was signed by Manohar on behalf of Sahodra and witnessed by Jagarnath.

On 18th September 1884, Jagarnath filed a petition of insolvency in the High Court of Calcutta. On 29th December 1884, Sahodra sold to Mathura Mohan and Hanuman Das the properties covered by Appeal No. 243, which arises out of Suit No. 338. On 10th January 1885, Sahodra made the sale to Sri Kishen, the uncle of the defendant Jai Kishen, of the property covered by Appeal No. 242, which arises out of Suit No. 340. On 4th March 1885 Jagarnath withdrew his application for insolvency. Now, the first question which arises in the appeals, and which is common to all of them, is with reference to the will. The learned vakils who have appeared for the respondents have maintained, firstly, that there was no will at all, or that if there was a will it was revoked, and that the title of Sahodra rests on adverse possession as against Jagarnath or the heirs of Fateh

Chand. There was some attempt made in the Court below to make out a case of heirship, but that case has been abandoned before us, and the position is that if there is a will then the only way in which defendants can succeed is by showing that Sahodra acquired a title by adverse possession. I will address myself first of all to the case whether there was any will.

It is urged, firstly, that the evidence as to the execution of the will is insufficient; secondly, that there is no evidence that the will was given effect to, or that it was operative; thirdly, that there is no trace of the will in Sheodei's lifetime; fourthly, that there is no evidence that the original will was ever lost. In my opinion all these contentions are groundless. The contemporaneous documents show that, not only was a will executed, but that it was acted upon. There is also evidence to show that the registration proceedings in connection with that will, so far at least as it is possible to ascertain at this distance of time, were regular, and that the story that the will has in fact been lost is a true story. Then it is contended that even if the will was executed, it did not contain any valid disposition of property. In my opinion, the terms of the will, so far as they purport to create a perpetuity and in so far as the restriction upon alienation is repugnant to the estate created, are inoperative, but the main purpose of the will is, as my learned brother has stated, to bequeath an absolute estate of inheritance to Sahodra, and so far as that estate is concerned, the will, in my opinion, is a valid document. I will next refer to the attacks which have been made upon the mode in which the will has been proved. It is contended that the will has not been legally proved, and that no case has been made out for the admission of secondary evidence. It appears that under S. 9, Regn. 36 of 1793, the will was duly registered and a copy was kept in the Registration Office and the original was returned to the testator. We have in evidence that Jagarnath saw the will in the possession of his mother Sahodra at some period after Sheodei's death.

We have also evidence to the effect that the will was kept after the death of Sahodra by Jagarnath in a two-storeyed house which was destroyed by rain, and

that in consequence of that destruction a number of papers kept in that house disappeared. I agree with the learned Subordinate Judge that the story of the destruction of the will at the time, notwithstanding many discrepancies, is on the whole true. Therefore the will having been destroyed, the certified copy which has been produced in evidence in the Court below is admissible as secondary evidence. As to the allegation that the will was revoked, there is no evidence whatever. The will, in my opinion, was a valid will at the time of Fateh Chand's death, and the distribution of the property merely depends upon the construction which we are to place upon that will. I will turn therefore to the main question of the case namely, the construction. I agree with my learned brother that the estate which was conferred upon Sahodra was not a life-estate but an estate of inheritance. It is no one's case; that it was the intention of the testator to create an intestacy upon the death of Sahodra is not well founded. There is no reason why the testator should have intended to create an intestacy. It was his intention to make provision not only for Sahodra herself, but for her children. There is a clear indication that the estate of Sahodra was to be an estate something different from the estate of Sheodei and I do not see why, if he intended Sahodra to have only a life-interest, he should have enjoined upon her and her heirs the duty of preserving the temples and performing the religious observances. Taking the documents as a whole, I am satisfied that it was his intention that Sahodra should have complete control of the property, in order that the testator's name might be preserved for ever.

We must assume that it was not the intention of the testator to assign merely the profits of the property, in view of the case of *Shookmoy Chandra Das v. Monoharri Dassi* (1), which lays down that a bequest only of the income of a property creating something in the nature of a perpetuity must be and is void. Another argument against our holding that the estate created in favour of Sahodra was only a life-interest in the English sense, is that in the absence of words of limitation, gifts to women in Hindu law, with the exception of a widow must be presumed to convey an absolute

interest, unless there is something repugnant in the context. It does not necessarily follow that because Sahodra was a woman, therefore she was incapable of taking anything more than a mere life-interest. The following cases are authority for this: *Atul Krishna Sircar v. Sanyasi Churn Sircar* (2); *Mt. Kellany Kocer v. Luchmee Pershad* (3); *Bhoba Tarini Debya v. Peary Lall San-nyal* (4) and *Ramasami v. Papayya* (5). Finally, it has been contended on behalf of the respondents that even if the estate conferred upon Sahodra was not an absolute interest, yet her interest was not a life-interest such as is known to English law but something corresponding to the interest of a Hindu widow, and that on the proof of justifying necessity the transfers with which we are dealing in the present appeals passed a good title. In my opinion this argument is well founded and even if the estate passed to Sahodra was not an absolute estate, even then there was justifying interest for the transfers in question. That interest was the payment of the debts incurred in the management of the business. Sahodra owed those debts, and it was her duty to discharge them, and therefore she was competent to alienate the immovable property of Fateh Chand, for the purpose of discharging the debts thus created. The case of *Sham Sundar Lal v. Achhan Kunwar* (6) is sufficient authority for this proposition. So far therefore as the case of the respondents rests on the will, I am satisfied from every point of view that the will conferred a transferable interest upon Sahodra, and the title which passed to the vendees, the defendants, and their predecessors, was a good title. Then arises the question of estoppel and that question is independent of the will.

I agree with my learned brother that there can be no estoppel in this case, for the simple reason that the vendees of Sahodra could not possibly have been deceived. It is in evidence that the parties were well known to each other, and that that transactions were all carefully tested by expert legal advisers. It is impossible to believe that the assertions of Sahodra to the effect that she was the

1. (1885) 11 Cal 684=12 I A 103 (P C).

2. (1905) 32 Cal 1051.

3. (1875) 24 W R 395.

4. (1897) 24 Cal 646.

5. (1893) 16 Mad 466.

6. (1899) 21 All 71=25 I A 188 (P C).

heir of Fateh Chand and the sole malik of the properties, or to the effect that she had acquired a title by adverse possession, really misled the vendees. Being the niece of Fateh Chand, Sahodra could not possibly have been an heir. Being the mother of Jagarnath, and Jagarnath being as the evidence discloses, her manager, it was scarcely possible that she could have acquired a title by adverse possession against Jagarnath. In these circumstances the representation that she had acquired a good title to the properties, even if made by Jagarnath, could not have possibly deceived anyone. Therefore, all those cases which have been cited on behalf of the respondents in support of the argument, that silence on the part of Jagarnath when his mother was transferring his properties estops him from now setting up the truth, seem to me to be irrelevant. Upon this point the authorities, which have been placed before us, are *Gregg v. Wells* (7) and *Thomas Barclay v. Syed Hossein Ali Khan* (8), and I say that these authorities do not apply to the facts before us. The general principle is that S. 115, Evidence Act, does not apply where the statement relied upon is made to a person who knows the real facts and who is not misled by the untrue statement. When both parties are equally conversant with the true state of the case it is absurd to refer to the doctrine of estoppel. They and their legal advisers all knew what they were purchasing, and it is idle for them now to try and set up a case of estoppel against the plaintiff.

The transactions were clearly in the nature of an attempt to get the better of the numerous other creditors, not less than 143, who were attempting to enforce their debts against Jagarnath and Sahodra. An examination of the circumstances makes this clear. In the transfers of 29th December 1884, and 10th January 1885, the vendees knew that Jagarnath could not be a party to the sales for he had included these properties in his schedule of insolvency before the High Court. The only way to get any interest in the properties was to take a transfer from Sahodra and to risk the invalidity. In the sale of 24th July 1884, although it was before the petition for insolvency, a suspicion arises that the very

same motives operated, for that transaction took place only two months before the schedule was filed. I have no doubt that the vendees knew perfectly well that Sahodra could not have had the full title which she was purporting then to transfer. In these circumstances the case of estoppel does not arise. Then there is the objection that Jagannath has not proved his heirship, that is to say, that he has not affirmatively established that he is the nearest heir of Fateh Chand. Reliance has been placed upon *In re, Jackson, Jackson v. Ward* (9) for the proposition that in a suit for recovery of possession of land there must be reasonable evidence to show that the plaintiff is the nearest heir. It is unnecessary to challenge this proposition.

The evidence, in my opinion, clearly shows that there was such reasonable evidence before the learned Subordinate Judge, and that the rebutting evidence which has been furnished by Thakur Das and Budri on behalf of the respondents is totally insufficient for the purpose of defeating the plaintiff. The learned Subordinate Judge has not recorded any finding upon this point, which was one of the issues in the case, but on an examination of the evidence I have no doubt that the plaintiff has made out the heirship which he claims. Then the defendants have resisted the suit on the ground of limitation. It is said by the plaintiff that Sahodra died on 9th November 1899; the suits were instituted on 9th November 1911, that is, on the very last day on which 12 years' limitation expires. The defendants plead that Sahodra died about 1st Kartik, corresponding to 20th October 1899. They base this plea upon an application for mutation filed by Jagarnath immediately after the death of Sahodra, in which it is stated that Sahodra died about the beginning of Kartik. Two witnesses are also called to prove that Sahodra, died on 1st Kartik. On the other hand in the plaint filed on 21st May 1901, against his sisters, Jagarnath stated that Sahodra died on 29th Kartik, corresponding to 16th November 1899.

It is possible that this figure 29 was a slip for the figure 21, and that corresponds to 9th November. But in any event the applicants' right having accrued, it is difficult to get over the statement in the

7. (1839) 10 Ad and E 90=2 P and D 296.

8. (1907) 6 O L J 601.

9. (1907) 2 Ch D 354=76 L J Ch 553.

mutation application which speaks of the beginning of Kartik. I can scarcely believe that Jagarnath meant the 21st Kartik when he said that Sahodra died in the beginning of Kartik. On the other hand the plaintiffs prove an account-book kept in the regular course of business in the firm of Bishunath Mahton, which shows that certain presents were sent to Jagarnath on the occasion of the shradh ceremony of his mother. The date of the entry is 22nd November 1899, and it is urged that Sahodra could not have died earlier than 7th November, because the ceremony cannot, in Hindu families, take place later than 15 days after the death. No doubt this entry is entitled to some weight as corroborative evidence; but it is not admissible as independent evidence because Sri Kishen, the writer, has not been called, and it has not been proved that he is dead or that he cannot be produced. Now accepting the entry as corroborative evidence, it merely raises a possibility or a presumption that the articles were sent some time before 22nd November and that the death took place not earlier than 7th November. In my opinion this evidence, taken with the oral evidence produced on behalf of the plaintiffs, fails to rebut the evidence of the entry in the mutation application. I would hold therefore that the suit is barred by limitation.

There remains only one other point which has been urged by the learned vakils for the respondents. They say that plaintiff is not entitled to succeed to the whole of the claim in the present suits because in a previous consent decree he made a compromise with one Chamru agreeing to give to Chamru a certain share in the properties in suit. An examination, however, of the agreement shows that the properties now in suit are not affected by the agreement, because one of the conditions of the agreement was that Chamru was to get a share in respect of those properties, for the recovery of which he advanced money to the plaintiff Jagarnath. As Chamru does not appear to have paid anything for the recovery of the present properties he has no title in them. The result, therefore, is that the appeals fail and are dismissed with costs.

V.S./R.K.

*Appeals dismissed.***A. I. R. 1916 Patna 146**

MULLICK AND ATKINSON, JJ.

Sapneswar Pujapanda and others—
Plaintiffs—Appellants.

v.

Ratkanar Mahapatra and others—
Defendants—Respondents.

Second Appeal No. 1687 of 1912, Decided on 24th July 1916, from a decision of Dist. Judge, Cuttack, D/- 20th March 1912.

Hindu Law—Religious office—Puja Pandas—Civil P. C. (1908), S. 9.

The Puja Pandas are not entitled to claim chanda in a respect of chhatrabhog at the temple of Lingaraj at Bhubhaneswar. [P 149 C1]

Dwarka Nath Mitter and Satish Chandra Bose—for Appellants.

M. S. Das, Subodh Chandra Chatterjee and Suresh Chandra Chakravarty—for Respondents.

Mullick, J.—The plaintiffs style themselves as Puja Pandas of the temple of deity named Lingaraj Mahaprabhu at Bhubaneshwar. The principal defendants style themselves as the Suar Pandas of the same temple. It is admitted by both parties that when a certain kind of offering called chhatrabhog is made by a pilgrim to the God it is the custom for the Suar Pandas to keep one-fourth for labour spent by them in cooking the food. The remainder of the cooked food is then handed to the Puja Pandas, who consecrate the same by means of incantations and ceremonies and return it to the pilgrim. The plaintiffs claim that out of the one-fourth share kept by Suar Pandas they, the plaintiffs, are entitled to keep one-fourth by way of remuneration for their labour, that is to say, the plaintiffs claim to keep 1/16th of the total offering of every pilgrim who offers chhatrabhog. There is another kind of offering called dalabhog, in respect of which a similar prayer is made. In the present suit the plaintiffs ask for the following reliefs: (i) That it may be declared that the plaintiffs are entitled to receive the 1/16th share of the chhatrabhog and dalabhog, the said share being commonly called chanda. (ii) That it may be declared that the principal defendants 1 to 9 have no right to offer dalabhog. (iii) That a perpetual injunction may be issued restraining defendants 1, to 9 from taking chanda due to the plaintiffs. (iv) That a decree may be passed

awarding the plaintiffs damages to the extent of Rs. 2,400.

The learned Subordinate Judge made a declaration that defendants 1 to 9 have no right to offer dalabhog, but he did not expressly declare that the plaintiffs were entitled to claim 1/16th in respect of this kind of offering. But in regard to chhatrabhog the learned Subordinate Judge held that the plaintiffs were not entitled to claim 1/16th share on account of chanda. He declined to grant the remaining prayers of the plaintiffs. On appeal the District Judge made an express declaration that the plaintiffs were entitled to 1/16th share as chanda in respect of dalabhog, but in other respects he affirmed the Subordinate Judge's decree. The present second appeal is preferred by the plaintiffs, and the only question before us is whether or not the plaintiffs are entitled to claim 1/16th of the chhatrabhog by way of chanda. The plaintiffs base their case, firstly, upon the ancient Shastras and secondly, on custom. Both Courts have found that the alleged custom has not been proved. The learned vakil for the appellants admits that he cannot go behind this finding and, therefore, has argued his case only on the basis of the Shastras. He contends that although the plaintiffs have failed to prove the custom alleged by them, still they are entitled to a decree if they can prove that the Shastras recognize their right. It is necessary, therefore, to examine the various texts upon which the parties rely.

Both parties admit that Lingaraj Mahaprabhu is one of the manifestations of Siva; that the ordinary pilgrim is not permitted to partake of the bhog or offering made to an image representing a manifestation of Siva if that manifestation is attended by an Upadevata or attendant deity named Chanda or Chandeshwar. According to Hindu mythology, Siva is in certain cases attended by Chandeshwar who is located in the north-east corner of the temple. After the bhog is offered to Siva 1/16th of the shown is shown to Chandeshwar, but no part of that bhog can be eaten by any one except a Siva Bhakta or votary of Siva. When Siva appears in the form of a Linga he may do so either as a Ban Linga, or a Linga made of jewels, copper, silver, gold iron; and in these cases "the bhog can be partaken by all with devotion." The Swayambhu Siva is the Siva who is self-

existent, whose origin cannot be traced, who is unborn and eternal. It is admitted that he is never accompanied by Chandeshwar. It is the case of the defendants that the term chanda is derived from the worship of Chandeshwar and that where there exists such worship, it is the right of the Puja Panda to claim 1/16th of chhatrabhog; where there is no such worship the Puja Panda has no such right. The lower Courts have found that it is the custom of all classes of pilgrims, whether special votaries of Siva or not, to eat the chhatrabhog offered to Lingaraj of Bhubaneshwar, they find that there can be no worship of Chandeshwar at this temple and it follows, therefore, that there can be no chanda for the plaintiffs in respect of chhatrabhog. The Courts arrive at the same result by another process. They find that Lingaraj is a Swayambhu Siva and that a Swayambhu Siva according to the Hindu Shastras is not attended by Chandeshwar. Therefore the plaintiffs are not entitled to chanda. If, therefore, that defendants can establish that Lingaraj at Bhubaneshwar is Swayambhu Siva, the plaintiffs' claim in respect of chhatrabhog must fail. Ex. E, a text from Lingaraj Puja Paddhati, runs as follows:

Out of no portion of the food already offered should offering be made to Chandeshwar. It is said in the Shaivagam 'in the case of Ban Linga Swayambhu Linga made of metal, and in the case of all images, Chanda has no right.' From this text Chandra Rudra has no right in connection with the worship of the great Swayambhu Lingaraj. It should simply be offered as to Krishna."

This text shows that Lingaraj is a Swayambhu Siva. Again, Ex. G is a text from the Ekambra Puran. I consider it established that Ekambra has been identified with Bhubaneshwar. Apparently the name owes its origin to the fact that at Bhubaneshwar there was only one mango tree, and the texts cited both by the plaintiffs and the defendants show that the temple of Lingaraj at Ekambra is the temple of Lingaraj at Bhubaneshwar. Ex. G runs as follows:

"The God who gives protection to those who are worthy of it, the God who is the lord of millions of Lingas, who is without end, whose virtues have no end, who knows no decline or destruction, who is Swayambhu, peace-giver, supreme, grantor of boons and auspicious, in whom all conceptions meet. Who does not worship such a God."

This text again, therefore, describes Lingaraj as Swayambhu. I next refer to

an extract from Ex. 21, Swarnadri Mahodaya the whole of which is devoted to the worship of Lingaraj Mahaprabhu. This text runs as follows.

"I am describing a large Linga who is giver of all fruition, a chief God in the north-east and near to Bhubanesha, who being round and very beautiful and having the form of a laddu, Brahma in ancient time referred to under the appellation of Laddukeswar. Oh, good Bhrahmans, very near him is Bhubanesh, him-self who is blessed above the blessed, worshipable, giver of all desires, perfect, chief Linga, beautiful, Swayambhu and remover of all sins. Thereafter touching seeing and bowing to Sakreshwar Linga a man is freed from all sins and attains the region of Indra. This Sakreshwar has been of yore worshipped by Sakra who is very powerful, bright and giver of boons to the faithful. The above is the description of the virtues of the Lingas inside the enclosure walls."

The learned vakil for the appellants contends that the translation submitted by the learned vakil for the respondents is incorrect and that the correct translation of the words,

Tatra sannihita sakhyat

is "in him directly present." He contends that the passage means that in Laddukeshwar Bhubanesha is directly present, and that the term Swayambhu applies not to Lingaraj of Bhubaneswar but to Laddukeshwar. In my opinion the translation given by the learned vakil for the respondents is the most suitable to the context. I observe also that neither before the learned Subordinate Judge nor before the learned District Judge was objection taken to this interpretation of the text. On the contrary, the learned Subordinate Judge states in his judgment that the texts are in simple Sanskrit and were understood by the vakils of both sides. If there had been any doubt as to whether the term Swayambhu was or was not applicable to Lingaraj of Bhubaneswar, I am certain that the interpretation now given by Mr. Mitter on behalf of the appellants would have been mentioned either before the Subordinate Judge or the District Judge. Then the appellants rely upon another text in the Siva Mahapuran for the purpose of showing that Lingaraj of Bhubaneswar is not a Swayambhu. This text runs as follows:

"Somenath is in Sourashtra, Mulikarjuna in Sir Saila, Mahakal in Ojein, Chaureswar in Ongkar, Kedar in the Himalayas, Vimasankar in Dakini, Bishweshar in Benares, Triambaka on the bank of the Goutami. Baidyanath in Ohitabhumi, Nagesh in Dwarka forest, Ramesh in Setubandha and Ghushmesha in Sibalaya. These are the

twelve avatars of Swayambu. The sight and touch of these confer all happiness on men."

It is contended that a Swayambhu Siva, being self-existent and unborn, must be synonymous with an avatar of Siva, and as Lingaraj of Bhubaneswar is not included in the above list of avatars he cannot be Swayambhu. I am not impressed with this argument. I do not believe that Swayambhu is synonymous with avatar. I prefer the interpretation that Swayambhu, which means self-existing, is capable of application to a Siva, the origin of which is lost in antiquity, in contradistinction to a linga which was established by some known person. Moreover, if the interpretation that there can be no Swayambhu Sivas except these twelve avatars be accepted, then the interpretation given by Dr. Mitter to the text regarding Laddukeshwar must necessarily be wrong; for according to him, Laddukeshwar is a Swayambhu and admittedly Laddukeshwar is not mentioned at all in the list of twelve avatars. I agree therefore with the Courts below that Lingaraj of Bhubaneswar is a Swayambhu, and if that is so, then the plaintiffs' claim must fail. The texts above cited also show that where the general public is permitted to partake of the bhog there can be no Chanda. It is found as a fact that the general public at the temple of Lingaraj is permitted to partake of the bhog.

Therefore also the plaintiffs' claim must fail. But Dr. Mitter further contends that the right of the plaintiffs to chanda in ohhatrabhog has no connexion with the worship of Chanda, and that it is a mere coincidence that the share prescribed in the Lingaraj Siva Puja and the Sive Chintamani as due to Chanda is identical with the share prescribed by the Niladri Mahodaya as the share of the Pujaka or Acharya. He contends that the Niladri Mahodaya is authority for the proposition that in respect of all nirmalya offerings made to Siva, the Pujaka, i. e. the priest, is entitled to 1/10th or 1/16th. The reply to this is that the Niladri Mahodaya is not an authority which applies to the temples at Bhubaneswar. It is a book compiled for the worship of the idols at Puri and the invocation:

"Oh King, you should always satisfy the Pujaka with 1/10th or 1/16th of the offering of the supporter of the world"

is applicable only to the Raja of Puri. The argument that the text is of general application to all Hindus in India does not commend itself to me. If therefore this text be rejected as not being applicable, the defendants' case that the grant of Chanda is always co-existent with the worship of Chanda remains un rebutted. I therefore think that on a consideration of the text the plaintiffs are not entitled to claim Chanda in respect of chhatrabhog at the temple of Lingaraj of Bhuvaneshwar. Moreover, their failure to establish that their claim is prescribed by custom tends to corroborate the interpretation which the defendants seek to place upon the Shastras. The result therefore is that the appeal fails and is dismissed with costs.

Atkinson, J.—I concur.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 149

CHAMIER, C. J. AND SHARFUDDIN, J.

Mahadeo Agarwalla—Defendant—Appellant.

v.

Ganesh Lal and another—Plaintiff and Defendants—Respondents.

Appeal No. 2544 of 1915, Decided on 9th August 1916, from appellate decree of Judicial Commissioner, Chota Nagpur, D/- 21st June 1915.

(a) Contract Act (1872), S. 83—Property—Suit for price of goods sold does not lie unless property has passed.

A suit for the recovery of price of goods sold does not lie unless the property in the goods has passed to the purchaser. [P 149 C 2]

(b) Contract Act (1872), S. 83—Appropriation—Plaintiff sending goods ordered by defendant to railway station for despatch—Defendant's agent examining goods before despatch and rejecting them—Plaintiff's suit for price cannot lie as there is no such appropriation as to property in goods to defendant.

Defendant ordered a certain quantity of catechu from plaintiff who sent the required number of bags to the railway station for despatch to the former. Before the bags were despatched the defendant's agent arrived, saw the catechu and rejected it. Plaintiff sued the defendant for the price of the catechu:

Held: that there had not been such an appropriation of the catechu for the purposes of the contract as was required by S. 83, Contract Act, and that, therefore, the property in the catechu not having passed to the defendant, the plaintiff could not sue for their price. [P 150 C 1]

Pugh and Siva Nandan Rai—for Appellants.

Ali Imam, Abani Bhusan Mukherji and Fakaruddin—for Respondents.

Chamier, C. J.—This appeal arises out of a suit brought by the respondents Ganesh Lal and Keshri Lal for the price of 250 maunds of black telia catechu said to have been bargained and sold to the appellant. In the Court of first instance the appellant did not appear and the case was decided *ex parte*. The facts are to be found in the evidence of the respondent Ganesh Lal himself. He said:

"I deal in catechu. Defendant 2 Chhagan Mal wrote to me from Neemuch asking the price of catechu in Jeth last. I replied. He asked for sample. I sent them. He sent a telegraphic order for 27 bags at Rs. 4 per maund. I agreed to sell at Rs. 3-14-0. Then he sent a letter asking for 41 bags. I sent 231 maunds in 92 bags to the station but did not despatch them as the money was not sent. Finally a joint letter from both defendants with two half notes for Rs. 500 each came ordering 250 maunds at Rs. 4. I sent 19 maunds more to the station on 6th August in 8 bags. Then a man Fateh Lal came to see the catechu and saw it and rejected it and asked for the return of the half notes."

Ganesh Lal states also that there was no good reason for rejecting the catechu and in this he was supported by the evidence of Chagan Mal, the man mentioned in the evidence of Ganesh Lal. It must be taken then that the appellant was not justified in refusing to take delivery of the catechu. The question for decision in this appeal is whether the plaintiffs-respondents are entitled to maintain a suit for the price of the catechu and some items such as the cost of gunny bags. It is contended on behalf of the appellant that a suit of this description does not lie unless the property in the goods passed to the purchaser; that in the present case the property in the goods did not pass to the purchaser inasmuch as the goods were not ascertained at the time of the agreement for sale, and no goods answering the description in the agreement were ever subsequently appropriated by the sellers for the purposes of the agreement, and that even if the sellers did appropriate catechu for the purposes of the agreement there was no assent to that appropriation on the part of the purchaser, therefore, the goods were never ascertained within the meaning of S. 83, Contract Act, the sale was never complete and the property in the catechu never passed. It is conceded by the learned counsel for the plaintiffs-respondents, and it is clear on the authorities, that a suit of this description cannot be maintained unless the property in the goods has passed. Therefore, the only question

which we have to decide is whether the property in the catechu in question passed before the suit was brought, and that resolves itself into the question whether this was a sale of unascertained goods and if so, whether any goods were subsequently ascertained within the meaning of S. 83, Contract Act.

The plaintiffs-respondents on their own showing are general dealers in catechu and other merchandise. The statement of Ganesh Lal quoted above shows that the agreement was for the sale and purchase of unascertained catechu. The sending of the catechu to the station might be regarded as an appropriation of that catechu for the purposes of the contract by the sellers, but it is not suggested by any one that such appropriation was assented to by the purchaser; in fact, as soon as the purchaser's agent saw the catechu he rejected it. In my opinion the suit was misconceived and was rightly dismissed by the Court of first instance. If the seller suffered loss, a suit for damages might have been maintained. I would allow this appeal, set aside the decree of the Judicial Commissioner of Chota Nagpur and restore the decree of the Court of first instance. The plaintiffs-respondents will pay the costs of the appellant here and in the lower appellate Court. There will be no order as to the costs of the respondent Chaggan Mal.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 150

ATKINSON AND KINGSFORD, JJ.

Ram Dayal Pandey and others—Defendants—Appellants.

v.

Genda Tewari and others—Plaintiffs—Respondents.

Second Appeal No. 2760 of 1914, Decided on 7th July 1916, from a decision of Sub-Judge, Arrah, D/- 7th May 1914.

Bengal Tenancy Act (1885), Ss. 105 and 109—Record of Rights—Plaintiffs having been recorded as tenure-holders in proceedings under S. 105, suit for amending of record and possession is barred by S. 109.

In proceedings under S. 105, Ben. Ten. Act, to which plaintiffs were parties certain entries in the Record of Rights, describing plaintiffs as tenure-holders and defendants as raiyats, were affirmed as correct. Plaintiffs brought a suit asking that the Record of Rights be amended and their names entered as raiyats instead of those of the defendants, and that they should be put in possession:

Held: that the status of the plaintiffs, having

already been determined under S. 105 by a Revenue Court having jurisdiction, the suit was barred by S. 109 of the Act: 16 I C 935, *Appr.* [P 151 C 2]

Susil Madhab Mullick and Uma Charan Laha—for Appellants.

Pugh, Kulwant Saha and Raejendra Prasad—for Respondents.

Atkinson, J.—The plaintiffs in this action seek a declaration against the defendants to the effect, that the Record of Rights, which was published on 14th December 1911, may be amended, and that the plaintiffs, who have been recorded in the Record of Rights as tenure-holders, may be recorded as raiyats, and that the defendants, who have been recorded as raiyats shall have their names struck out or expunged from the record and the plaintiffs inserted in their stead; and that consequential upon such declaration the Court shall be pleased to decree possession in favour of the plaintiffs of this holding, now enjoyed and held by the defendants as tenants to the plaintiffs. That is the form of the action. The facts out of which this action arises are shortly as follows. The Maharaja of Dumraon brought a proceeding under S. 105, Ben. Ten. Act, 1885, against the plaintiffs for enhancement of rent; and in that proceeding the plaintiffs lodged an objection as to their status under S. 105-A, protesting that their description as tenure-holders was wrong, and that they were in fact raiyats. The Settlement Officer who had jurisdiction under S. 105 to hold the inquiry, having heard the parties, held that the plaintiffs in this suit were properly recorded as tenure-holders of the Maharaja, and that the Record of Rights was maintained and held to be accurate. In that record, as I have stated, the defendants were recorded as raiyats. This action is now brought claiming the relief which I have stated. Mr. Mullick, on behalf of the defendants, raised the point under S. 109, Ben. Ten. Act, that this action was not maintainable, on the ground that it was an application or suit concerning a matter which had been already the subject-matter of an application under S. 105, Ben. Ten. Act; and that therefore it was not competent for any civil Court to entertain such an application or suit.

The very essence of the plaintiffs' case here is to try and get behind the Record of Rights, to have their status as therein

described altered and changed to something different, essentially different, and to have the defendants' character as rai-yats changed. That is the real motive and object of this action; and that consequential upon the change of status of the plaintiffs and the defendants, that then the plaintiffs should be entitled to possession. Mr. Pugh, when he was faced with this difficulty—although his colleague on the last occasion when this case was argued, frankly admitted that if the identity of the lands could be established in this suit with those giving rise to the proceedings under S. 105, then he would admit that there was no jurisdiction in this Court to entertain this action—Mr. Pugh says now,

"Oh, this does not matter. I do not want this declaration. What I asked for by my plaint may go by the board. I want to maintain that part of my claim which deals with recovery of possession. I am suing the defendants here as trespassers. This is an action on title for ejectment against trespassers."

Every bit of the claim every averment in the claim is inconsistent with that relief. Mr. Pugh wants us now to give the go by to the entire pleading, to the form in which the plaintiffs have stated the relief they seek in the prayer to the plaint and treat this action as one for trespass. I shall for one be no party to such a proceeding. If the plaintiffs think they have or had, a claim for trespass as against these defendants, they could and might have brought it. And if they had brought it, S. 109, Ben. Ten. Act, would not have applied. But they did not think fit, acting no doubt within their discretion, to bring the action in that form; and they proceeded in the present case for the relief prayed for. In our opinion it is obviously clear what was the meaning and intention of the legislature in enacting S. 109. It was to avoid conflicts arising between the Revenue Courts on the one side and the civil Courts on the other: and when an issue is decided by a Revenue Court having jurisdiction as in this case, under S. 105, the decree having the force and effect of a decree of a civil Court, no action was capable of being entertained by a civil Court in connexion with any matter decided in the proceeding under S. 105. One cannot for one moment entertain the suggestion that this is not an action touching and concerning a matter that had been determined by the Settlement Officer under

S. 105. The basis of the objection then made by the plaintiffs was as to their status, and it is that status they want now to have rectified, and that is the foundation of their claim.

I desire to refer to the case of *Sheodhani Pandey v. Beni Pershad Koeri* (1). This case was before a Full Bench and there the very same point as here was taken, but it was not taken until second appeal, and Sir Lawrence Jenkins said, apart altogether from the merits,

"In our opinion however the suit should have been dismissed under S. 109, Ben. Ten. Act, because this is a suit which concerns a matter which has been the subject of an application made and proceedings taken under S. 105 of that Act, and a suit of such a character cannot be entertained by a civil Court under S. 109. It was therefore not open to the lower Courts and to Carnduff, J., to try the merits of this case."

We adhere to the ruling of that distinguished Judge. Therefore we think this action should be dismissed on the ground that there was no jurisdiction in the Court under S. 109 to entertain this action in its original form. We allow this appeal so far as it deals with the plots set out in the schedule on p. 22 of the paper-book from 17 to 347, and we dismiss the action. The costs in the lower Court, in the lower appellate Court and in this Court will be paid by the plaintiffs.

Kingsford, J.—I agree.

V.S./R.K. *Appeal allowed.*

1. (1912) 16 I C 935.

A. I. R. 1916 Patna 151

CHAMIER, C. J. AND JWALA PRASAD, J.
Avadh Behari Misra—Petitioner.

v.

Dwarka Prasad Singh—Opposite Party.

Criminal Revn. Petn. No. 34 of 1916, Decided on 17th April 1916, against an order of Sessions Judge, Monghyr, D/- 22nd December 1915.

Criminal P. C. (1898), S. 439—High Court will not interfere when reasonable diligence is not exercised by party in prosecuting case.

The revisional jurisdiction of the High Court is discretionary and it will not interfere in revision at the instance of applicants who do not show reasonable diligence in prosecuting their cases. [P 152 C 2]

Ali Imam, Mazharul Haque and Naresh Chandra Sinha—for Petitioner.

Sultan Ahmad—for Opposite Party.

Judgment.—*Dwarka Prasad Singh* brought a charge against the petitioner and 20 others under Ss. 143 and 179.

I. P. C. All were eventually acquitted and the Magistrate on the application of the petitioner sanctioned the prosecution of Dwarka Prasad Singh on charges under Ss. 193 and 211, I. P. C. The sanction was revoked by the Sessions Judge and we are now asked to set aside the Judge's order and restore that of the Magistrate. There is a conflict of authority on the question whether a third Court can interfere in a case of this kind under S. 195 (6) Criminal P. C., or must interfere if at all, under S. 439 of the same Code. It is not necessary for us to decide this question of law, for in our opinion the order of the Sessions Judge is clearly right and should not be disturbed even if this matter should be treated as coming before us by way of appeal.

The Magistrate who tried the original case summarised his conclusions as follows:

"For the reasons stated above I entertain very great doubt as to the truth of the case for the prosecution...Avadh Behari's (present petitioner's) daughter was dangerously ill in her father-in-law's house at Hajipur and he went there about the time of the alleged occurrence. The alibi of this accused has been proved to my satisfaction by witnesses of Hajipur, the telegram, and the evidence of two railway clerks and the entries in their registers".

Counsel for the petitioner relied upon this passage as showing that this was eminently a case in which sanction should be given for the prosecution of the complainant. But we are not bound to accept the Magistrate's estimate of the value of the evidence produced to prove the alibi set up by Avadh Behari, and on examining that evidence, we find that part of it is irrelevant and that the remainder is of no value. The offence is said to have been committed on 13th February 1915. The telegram shows that Avadh Behari was summoned to Hajipur on the 9th and one of the railway officials states that he sold a ticket to Avadh Behari on that date. A ticket-collector proves that he collected at Kiul a ticket issued at Hajipur on 14th. It is suggested that Avadh Behari travelled back from Hajipur with that ticket, but the ticket-collector did not identify him and it does not appear why Avadh Behari should have booked to Kiul when in the ordinary course he would book to Lakhsrai. Thus the railway evidence is either valueless or irrelevant. The evidence of the two witnesses from Hajipur can certainly not be accepted as proving

satisfactorily that Avadh Behari was at Hajipur on 13th February.

We notice also that the plea of alibi was set up in such a way as to prevent the prosecution from enquiring into it or testing it except by impromptu cross-examination. Avadh Behari, when examined by the Magistrate on 21st July said that he would put in a written statement. The examination of witnesses for the defence began on 5th August but Avadh Behari did not put in his written statement or the telegram till 21st August when he produced his witnesses. Thus the prosecution had no notice of the defence to be set up until the very day on which the evidence in support of it was produced. We are surprised that the Magistrate should have expressed the opinion that Avadh Behari's alibi was proved. We find that it was not proved, and we think that there is no prospect whatever of a conviction being obtained, if sanction is given for the prosecution of Dwarka Prasad Singh. In our opinion, therefore, sanction should not be given. Lastly, we note that the present application for revision was presented not less than three months after the order of the Sessions Judge. The revisional jurisdiction of this Court is discretionary and we wish it to be clearly understood that the Court will not interfere in revision at the instance of applicants who do not show reasonable diligence in prosecuting their cases.

V.S./R.K.

Application rejected.

A. I. R. 1916 Patna 152

CHAMIER, C. J. AND JWALA PRASAD, J.
Jitan Dusadh—Complainant.

v.

Domoo Sahoo—Accused.

Criminal Ref. No. 2 of 1916, Decided on 28th April 1916, made by Dist. Magt., Monghyr, D/- 23rd March 1916.

(a) Criminal P. C. (1898), S. 247—*Acquittal under S. 247 is permissible when complainant does not appear but not when he is dead before trial.*

The complainant having died in the course of the trial, his son applied for permission to continue the proceedings. The Magistrate declined to do so and acquitted the accused, holding that under S. 247, Criminal P. C., he had no option but to acquit. On a reference by the District Magistrate, who stated that the matter was one which affected the tranquillity of the district:

Held: that S. 247, Criminal P. C., applies primarily to the case of a complainant who is alive but does not appear and not to the case of a complainant dying before trial, and that the

order of acquittal was wrong in law: *A. I. R. 1915 Cal. 263* and *28 I. C. 658, Ref.* [P 153 C 2]

(b) Criminal P. C. (1898), S. 438—Revision—High Court can interfere when erroneous view of law is taken by Court without exercising discretion.

That though it is the settled practice of the High Court not to interfere in revision with acquittals, the order of acquittal in this case which involved the peace of the district should be set aside, especially as the Magistrate had not exercised his discretion but acted on an erroneous view of the law. [P 154 C 1]

K. P. Jayaswal and *Chandra Sekhar Prasad Singh*—for Complainant.

Ali Imam—for Accused.

Judgment.—This is a reference by the District Magistrate of Monghyr, in which he recommends that an order of acquittal passed by a Deputy Magistrate at Monghyr should be set aside. The facts are as follows: Loka Mahton and Domoo Sahu are rival zemindars in a village and have been on bad terms with each other for some years. One Paltan Khan, said to have been an influential resident of the village, was appointed gomasta by Domoo Sahu and succeeded in gaining over most of the villagers to the side of his master. Jitan Dusadh, a tenant in the village and gorait of Loka Mahton, was asked by Paltan Khan to give up service under Loka Mahton and go over to the side of Domoo Sahu. Jitan refused and it is said that, in consequence of his refusal, in the middle of the night of January 1914, Paltan Khan and others appeared at his house and carried off a quantity of paddy belonging to him. Jitan complained to the police and subsequently also to a Magistrate, with the result that Paltan Khan and others were placed on their trial and were convicted under Ss. 379, 147 and 323, I. P. C. As the riot appeared to have been committed in the interest of Domoo Sahu, the employer of Paltan Khan, Jitan Dusadh applied to the District Magistrate to place Domoo Sahu also on his trial for offences under Ss. 154 and 155, I. P. C.

The District Magistrate on that application directed the prosecution of several persons who were supposed to have taken part in the riot, and ordered Jitan to file a fresh application against Domoo Sahu. Jitan did so and 27th January 1916 was fixed for the trial. There was an adjournment to 11th February but on 4th February Jitan died. His son appeared in Court on 11th February and asked to be allowed to go on with the

case. But the Deputy Magistrate acquitted the accused under S. 247, Criminal P. C. It is quite clear from the order of acquittal and also from the explanation furnished by the Deputy Magistrate, that he was of opinion that he had no option but to acquit the accused in the circumstances. We have been referred to two cases on the construction of S. 247, Criminal P. C., namely, *Madho Chowdhury v. Turab Mian* (1) and *Purna Chandra Moulik v. Dengar Chandra Pal* (2). In the former a servant of a zemindar had lodged a complaint of an offence under S. 426, I. P. C. When the case was called on it was found that the complainant was dead and the Magistrate acquitted the accused. The High Court said:

"When the day came for disposal, the servant of the zemindar, who had made the complaint, was dead, and the Magistrate adopted the rather extraordinary course, although he knew that the servant was dead, of acquitting the accused under S. 247, Criminal P. C."

The Court seems to have been of opinion that the Magistrate had no jurisdiction to pass an order of acquittal in the circumstances. In the second case a complaint had been made of offences under Ss. 448, 352 and 323, I. P. C., but the Magistrate had summoned the accused to answer a charge under S. 352, I. P. C. only. The original complainant having died, a nephew of the deceased asked the Magistrate to permit him to go on with the case. The Magistrate allowed the petition on the ground apparently that the accused had been guilty of contempt of Court. The learned Judges who disposed of this case said:

"The case is one under S. 352, I. P. C. which is compoundable, and we see no reason for the substitution of Bisseshur in place of the deceased complainant. An order under S. 247, ought to have been passed by the Magistrate on the failure of the complainant to appear at the hearing of the case, and S. 247, empowers the Magistrate to acquit the accused person, unless for some reason he thinks proper to adjourn the case to some other day."

They then went on to hold that the reason given by the Magistrate for proceeding with the case was not sufficient and they set his order aside. It is open to doubt whether S. 247 of the Code was intended to apply to such a case as this. It seems to apply primarily to the case of a complainant who is alive but does not appear, for the closing words of the first paragraph of the section seem to

1. *A I R 1915 Cal 263*—*26 I C 174*.
2. (1915) *28 I C 658*.

suggest that the case should be adjourned in order to enable the complainant to appear. If S. 247 does not apply at all to a case of this kind, there was nothing to prevent the Magistrate from going on with the proceedings. If it does apply to such a case, then we think that the case before us was eminently one in which the Magistrate should have decided to go on with the proceedings. The District Magistrate points out in his reference that the offence complained of is an offence against the public tranquillity, and he says that if he had contemplated the possibility of the case being dismissed on account of the absence of the complainant he would himself have taken action. It is urged before us that we ought not to interfere with an order of acquittal except on appeal by the Local Government. There is no doubt that the practice of the High Courts has always been to refuse to interfere in revision with acquittals except for special reasons. In the present case if the Magistrate had exercised his discretion and had given reasons for refusing to go on with the case, we might have been disinclined to interfere, but he seems to have thought that he had no option but to acquit the accused. It is a mere accident that the present case was instituted on the complaint of Jitan. It is a case of considerable importance involving the peace of the district, and under the circumstances we think that we ought to set aside the order of acquittal. The Sub-Divisional Magistrate's order is accordingly set aside and he is directed to proceed with the trial of the case.

V.S./R.K.

Order set aside.

A. I. R. 1916 Patna 154

MULLICK AND ATKINSON, JJ.

Birabhadra Ruth and others—Plaintiffs—Appellants.

v.

Janardan Proharaj Mohapatra and others—Defendants—Respondents.

First Appeal No. 375 of 1913, Decided on 18th July 1916, from decision of Offg. Sub-Judge, Cuttack, D/- 24th June 1913.

Bengal Estates Partition Act (1897), S. 113—No appeal lies to Board of Revenue from Commissioner's order declining to confirm partition submitted by Collector—Neither can it exercise its revisional jurisdiction under S. 114.

No appeal lies to the Board of Revenue under S. 113. Bengal Estates Partition Act, from an

order of the Commissioner declining to confirm a partition submitted by the Collector. [P 155 C 1, 2]

The Board of Revenue cannot in the exercise of its revisional jurisdiction under S. 114 of the Estates Partition Act, interfere with an order of the Collector, purporting to be made under S. 11 (c) of the Act, dismissing an application for partition, or with an order of the Commissioner declining to confirm a partition submitted by the Collector. [P 155 C 2]

Per *Mullick, J.*—The powers of superintendence conferred upon the Board of Revenue by Cl. (8), S. 8, Regn. 2 of 1793 must be controlled by the provisions of the Estates Partition Act (5 B. C. of 1897), which, by express enactment, restricts and defines its powers of interference. [P 155 C 2; P 156 C 2]

Per *Atkinson, J.*—Regulation 2 of 1793 and 3 of 1882 are not in *pari materia* with the aim, scope and object of the jurisdiction conferred by the Bengal Estates Partition Act of 1897. Therefore, the power of revision conferred upon the Board of Revenue by Regn. 2 of 1793 does not in any way operate to control the revisional jurisdiction given to the Board by the Act of 1897. [P 156 C 2]

Satish Chandra Bose—for Appellants.

Suresh Chandra Chakravarty—for Respondents.

Mullick, J.—The parties to the suit out of which this appeal arises were applicants before the Collector for partition under the Estates Partition Act [5 (B. C.) of 1897]. The Collector approved of the partition proposed by the Deputy Collector and sent the papers as required by law to the Commissioner. The Officiating Commissioner, Mr. Clark, however, declined to affirm the partition on the ground that the allotments were not compact and returned the papers to the Collector in order that a fresh partition might be made. He at the same time expressed the opinion that if a fresh partition in conformity with his orders could not conveniently be made, the Collector would be competent under S. 11 (c) of the Act to dismiss the application for partition. That order was made on 11th September 1911. But defendants 1, 4, 5, 6, 7, 27, 28, 29, 30 and 31 of the present suit decided to contest it and preferred an appeal to the Board of Revenue. While this appeal was pending before the Board, the Collector, in consequence of the remand order made by the Officiating Commissioner, reconsidered the case, and having come to the conclusion that no compact partition could be made, dismissed the application on 23rd October 1911, purporting to act under S. 11 (c) of the Act. Neither an appeal to the Commissioner nor an application for revision to the Board was made against that order

of dismissal, but Mr. Clark's successor, the permanent Commissioner, while forwarding to the Board the petition of appeal against the Officiating Commissioner's order of 11th September 1911 which petition had been laid before him for transmission to the Board, also forwarded a report on the proceedings of the Collector culminating in the order of 23rd October 1911.

The Board of Revenue had, therefore, before them, firstly, the appeal which had been preferred to them through the Commissioner against the order of the Officiating Commissioner, and secondly, a report on the proceedings which had taken place in the Court of the Collector subsequent to and in consequence of the remand order of the Officiating Commissioner. It appears that the construction which the Board of Revenue put upon the judgment of the Officiating Commissioner was that the Officiating Commissioner had in effect confirmed the partition which had been approved by the Collector and, taking this view, the Board held that there was nothing done by him with which it could interfere in exercise of its appellate jurisdiction. But the Board, purporting to act in exercise of its general powers of revision, proceeded to interfere with the Collector's orders of 23rd October 1911 under S. 11 (c), with the result that the Deputy Collector's partition now becomes final between the parties. The plaintiffs thereupon instituted the present suit, praying for a declaration that the Resolution of the Board of Revenue of 15th March 1912 was without jurisdiction, and for an order that a partition be made by the civil Court. The learned Subordinate Judge is of opinion that the Board acted with full jurisdiction and that the present suit is not maintainable. In my opinion, the Board had no jurisdiction to interfere with the order of the Commissioner. The appellate powers of the Board under Act 5 (B. C.) of 1897 are prescribed by S. 113 of the Act. The learned vakil for the respondents relies upon Cl. (c) of that section and urges that the Officiating Commissioner had in effect amended a partition approved by the Collector. In my opinion he had done no such thing. He had declined to confirm the partition which was approved by the Collector and ordered the Collector to make a fresh partition; by

no stretch of language could this be called an amendment of a partition. Clearly no appeal under S. 113 lay.

The next question is whether the Board had any revisional jurisdiction in the matter. The learned vakil for the respondents admits that under S. 114 of the Act, there was no such jurisdiction. It is quite clear that the revisional jurisdiction conferred by Act 5 (B. C.) of 1897 is considerably narrow than that conferred by the previous Act [Act 8 (B. C.) of 1876], and I agree that S. 114 of the present Act, could not possibly empower the Board to exercise revisional jurisdiction against the orders either of the Officiating Commissioner or of the Collector. But the learned vakil relies upon what he calls the Board's general powers of superintendence, and he refers us first to Regn. 2 of 1793, which lays down rules for the conduct of the Board of Revenue and of Collectors. Cl. (8), S. 8, of that Regulation directs that the Collectors shall perform certain duties under the superintendence of the Board of Revenue in respect of landed property paying revenue to Government, which may be ordered to be divided into two or more distinct estates. Now conceding that this clause is applicable to the division of an estate into two or more distinct estates for the purposes of Act 5 (B. C.) of 1897, I think, it is clear that it does not empower the Board to interfere with the acts of the Commissioner. Therefore, in the present case, so long as the Officiating Commissioner's order stands, the Board's Resolution as regards the Collector's order would seem to be nugatory.

But I would go further and hold that the powers of superintendence conferred by the clause are and must be controlled by the later Statute of 1897 which, by express enactment, restricts and defines its powers of interference and that the Board had no jurisdiction at all to set aside the Collector's order. In my opinion therefore, Reg. 2 of 1793 cannot be invoked in aid of the respondents.

Then the learned vakil relies upon Reg. 3 of 1822, which modifies the powers conferred upon the Board of Revenue. That Regulation, however, has no bearing upon the present case. The result, therefore, is that in my opinion the order of the Board of Revenue of 15th March 1912 was without jurisdiction,

and the plaintiffs are entitled to the reliefs for which they have prayed. They press for a partition by the civil Court and are unwilling to accept any of the papers which have been prepared in the office of the Collector. They are unable to accede to our suggestion that they should come to a settlement or at any rate avoid the expense and delay of a fresh partition by accepting the Deputy Collector's partition as a basis for the civil Court partition. In these circumstances the appeal will be allowed, the declaration prayed for will be given and the lower Court will be directed to proceed with the suit and make the partition for which the plaintiffs pray. The appellants will get their costs.

Atkinson, J.—I concur with the judgment given by my learned colleague and with the order which he has pronounced and the form that the decree shall take in this case. But speaking for myself I want to add one or two observations as to the argument addressed to us by the learned vakil for the respondents. I am quite satisfied so far as the order of 11th September 1911 is concerned that the Board of Revenue had no appellate jurisdiction to review the order of the Commissioner under the provisions of S. 113, Act 5 of 1897. The learned vakil for the respondents admitted without hesitation in the course of his argument that the Board of Revenue had no appellate jurisdiction to review the order of the Commissioner and he was obliged to rely upon the alleged revisional jurisdiction supposed to be possessed by the Board to justify their order of 15th March 1912. And on this point his argument was based not upon the construction of S. 114, Estates Partition Act (5 B. C.), of 1897, but upon a general resume of the Regulations going so far back as 1793 and 1822; and more specially upon the interpretation to be put upon sub-Cl. (7), S. 8, Reg. 2 of 1793. Speaking for myself alone I do not think that the power of revision conferred upon the Board of Revenue by the Regulation of 1793 in any way operates to control the revisional jurisdiction given to the Board of Revenue by the special Act of 1897. I have examined the Regulation of 1793 which I think has a set and definite purpose, namely, to enable the Government to freely and more conveniently collect the revenue due by zamindars; and in the

process of the collection of the revenue jurisdiction is given to the Board of Revenue to divide estates to enable the revenue to be collected with greater facility. I now turn to the Statute of 1897. What was its object? It was a Statute designed to give jurisdiction to the Board to partition estates between joint owners of property inter se, and in effecting that partition to secure so far as possible a division of property amongst the co-sharers which would enable the revenue to be easily collected; but it was a jurisdiction distinct and different entirely from the jurisdiction conferred by the Regulation of 1793.

In my opinion it was a new jurisdiction conferred by a new statute, and under that Statute the Board's powers whether by way of appeal or revision, are expressly limited by statutory enactment. Admittedly under S. 114 there is no power of revision in this case. If it was the intention of the Legislature to give a revisional jurisdiction under the Act of 1897, why should they seek to restrict that revisional power by limitation when the larger power of revision existed under the Regulation of 1793, if it was intended that the larger and more extensive power of revision was to apply to proceedings by way of partition under the Act of 1897? To ask the question is to answer it, because the Regulations of 1793 and 1822 were not intended to apply nor were they in *pari materia* with the aim, scope and object of the jurisdiction conferred by the Estates Partition Act, 1897. It is regrettable that the parties in this case could not agree to some form of settlement. This litigation has been continuing since 1911, and this is 1916, five solid years and five solid years more will possibly elapse before the civil Court is able to effect a partition. In the meantime the parties will only become the poorer for their folly and none the wiser in the end.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 156

SHARFUDDIN AND ROE, JJ.

Ram Narain Ram and others—Defendants—Appellants.

v.

Pati Ram Tewari and others—Plaintiffs—Respondents.

Second Appeals Nos. 961 and 1105 of 1913, Decided on 10th April 1916.

(a) Civil P. C. (5 of 1908), Sch. 2, Paras. 10 and 16—Order filing award is not appealable.

No appeal lies against the order of a Court recording an award: 29 Cal. 167 (P. C.) *Foll.*

[P 157 C 1]

(b) Civil P. C. (5 of 1908), Sch. 2, Para. 16—Agreement to abide by decision of majority—Minority present at arbitration but not signing award—It is not invalidated.

Where the parties to a suit refer the matter in dispute to arbitration, agreeing to abide by the decision of the majority, it is enough if the award is signed by the majority. The refusal of the minority to sign will not affect its validity if they were present throughout the proceedings and took part in the deliberations: 6 W. R. 95, *Rel. on.*

[P 157 C 2]

Susil Madhab Mullick—for Appellants.

Chandra Sekhar Prasad Singh—for Respondents.

Roe, J.—These are appeals from the order of the Subordinate Judge refusing to set aside an order of the Munsif recording an award made by arbitrators. In accordance with the terms of a decision in the case of *Ghulam Khan v. Muhammad Hassan* (1) no appeal lies against the recording of the award. The proceedings of the learned Subordinate Judge in hearing the appeal were without jurisdiction. Inasmuch as the papers are on the table before us, we call for the record under S. 115 and proceed to consider whether the action of the Munsif in recording this award was made with or without jurisdiction. There are two points urged before us on which particularly the Munsif had no authority to record the award. The first is that it was not properly referred to arbitration and the second is that the arbitrators named by the Munsif did not join in the proceedings. The third ground urged is that the learned Munsif exercised his jurisdiction without proper discretion in refusing to withdraw the case at an early stage from the arbitrators as soon as he discovered that two of them were connections of the plaintiff. With regard to the first ground it is impossible for us to entertain the objection; it was not placed before the Munsif at all. We have no materials upon which we can say that there was no proper reference to arbitration. With regard to the second ground, the Munsif has found as a fact that the evidence of two arbitrators given before him is true evidence and that the third arbitrator was present throughout the proceedings and only refused to sign the award, when

1. (1902) 29 Cal 167=29 IA 51 (P. C.).

he discovered that it would be against the plaintiffs. The learned Munsif has also set down as an undisputed fact, in his opening of the judgment, that the parties agreed in the first instance to abide by the decision of the majority. It is clear, therefore, that there has been a decision of the majority come to after full discussion by the whole body of the arbitrators, and that the applicant for revision before us is bound by that decision, even though it is not signed by the minority. This is in accord with the case reported as *Kazee Syud Naser Ali v. Mt. Tinoo Dassia* (2). The appeals are dismissed with costs. We note that there is no necessity to interfere under S. 115.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeals dismissed.*

2. (1866) 6 W R 95.

A. I. R. 1916 Patna 157

CHAMIER, C.J. AND SHARFUDDIN, J.

Raghunath Prasad Singh and others
—Defendants—Applicants.

v.

Yahya Hussain and others—Plaintiffs
—Opposite Parties.

Privy Council Appeal No. 1 of 1916, Decided on 22nd November 1916, against judgment of Chapman and Atkinson, JJ., D/- 10th April 1916, in Appeal from Original Decree No. 354 of 1912.

Civil P. C. (1908), S. 110, and O. 45, R. 2—Value—Suit for declaration of one-anna share—Relief valued at Rs. 3000—Suit dismissed—First appellate Court holding value of suit to be Rs. 24,000 under S. 21, Bengal, N. W. P. and Assam Civil Courts Act, and returning memo- of appeal as appeal lay to High Court—Appeal allowed by High Court—Defendants applying for leave to appeal to His Majesty in Council—Leave cannot be granted as value of subject-matter is less than Rs. 10,000 whatever the value of suit under S. 21, Bengal, N. W. P. and Assam Civil Courts Act (12 of 1887).

Plaintiffs claimed a declaration that they were entitled to a one-anna share in the takhta of 8-annas awarded to defendants. In their plaint they stated that the value of the reliefs claimed by them was Rs. 3,000. The lower Court dismissed the claim. The plaintiffs appealed in the first instance to the District Judge who, holding that the value of the original suit within the meaning of S. 21, Bengal, N. W. P. and Assam Civil Courts Act, 1887, was Rs. 24,000 and that therefore the appeal lay to the High Court, returned the memorandum of appeal to the plaintiffs. The appeal was then presented to the High Court and was allowed. The defendants thereupon applied to the High Court for leave to appeal to His Majesty in Council:

Held: that whatever might have been the value of the original suit for the purposes of S. 21, Bengal, N.-W. P. and Assam Civil Courts Act, the value of the subject-matter in dispute on appeal to His Majesty in Council being the value of the one-anna share claimed by the plaintiffs, which did not involve directly or indirectly any claim or question to property approaching Rs. 10,000 in value, the defendants' application must be dismissed. [P 158 C 2]

Ram Lal Dutt—for Applicants.

Khurshed Husnain — for Opposite Parties.

Judgment.—This is a petition by the defendants in a suit under O. 45, R. 2, Civil P. C. This Court reversed the decision of the Court below. The applicants are therefore entitled to appeal to His Majesty in Council if the value of the subject-matter of the suit in the Court below was Rs. 10,000 or upwards and the value of the subject-matter in dispute on appeal to His Majesty in Council is the same sum or upwards, or the decree involves directly or indirectly some claim or question to or respecting property of the like value. Under a decree dated 22nd June 1907, a takhta of 8 annas was awarded to the defendants. In the present suit the plaintiffs claimed a declaration that they are entitled to a one-anna share in that takhta and a decree for separate possession of that share. They also claimed a declaration that the defendants have no mukarari right in the one-anna share. The Court below dismissed the claim. On appeal the plaintiffs' right to a one-anna share was not disputed and the only question for decision was whether the defendants had a mukarari right in the share. This Court held that the defendants had no mukarari right in the share and decreed the plaintiffs' claim as laid.

In their plaint the plaintiffs stated that the value of the reliefs claimed by them was Rs. 3,000 and they paid court-fees on ten times the Government Revenue of a one-anna share under S. 7 (5), Court-fees Act. The appeal by the plaintiffs was presented in the first instance to the District Judge, but that officer on the authority of the ruling in *Biraj Mohini Dasi v. Chintamani Dasi* (1) held that the value of the original suit within the meaning of S. 21, Bengal, N. W. P. and Assam Civil Courts Act 1887, was Rs. 24,000 and therefore, the appeal lay to the High Court. The memorandum of appeal was therefore returned to the de-

1. (1906) 3 C L J 197 f. n.

fendants' vakil and was presented to the High Court at Calcutta. On the constitution of this Court the appeal was transferred to this Court and was heard by this Court with the result above stated. At the hearing of the appeal the defendants did not contend that the appeal should have been heard by the District Judge. When the appeal had been allowed, a question arose as to whether costs should be calculated on Rs. 24,000 the value of the entire 8-annas takhta or on Rs. 3,000 the value of the share claimed, and at the instance of the defendants (present applicants) this Court decided that the costs should be calculated on Rs. 3,000. It appears to us that whatever may have been the value of the original suit for the purposes of S. 21, Bengal, N. W. P. and Assam Civil Courts Act, according to the decisions of the Calcutta High Court, on the correctness of which we express no opinion, the value of the subject-matter in dispute on appeal to His Majesty in Council would be the value of the one-anna share claimed by the plaintiffs. No part of the 8-annas takhta is in dispute or can be affected by the preliminary decree which has been passed, except the one-anna share the value of which can by no possibility approach Rs. 10,000, and therefore, it cannot be said that the decree of this Court involves directly or indirectly any claim or question to property approaching Rs. 10,000 in value. In our opinion the present case is not distinguishable in principle from that of *DeSilva v. DeSilva* (2). We agree with the decision of Jenkins, C. J., and Russell, J., in that case and we dismiss this application with costs. Hearing fee Rs. 80. The application for stay of execution is also dismissed.

V.S./R.K. *Application dismissed.*

2. (1904) 6 Bom L R 408.

A I. R. 1916 Patna 158

ROE AND JWALA PRASAD, JJ.

Rameshwar Prasad and another—
Plaintiffs—Appellants.

v.

Baranashi Prasad and others—Defendants—Respondents.

First Appeal No. 462 of 1912, Decided on 14th December 1916, from decision of Sub-Judge., Muzaffarpur, D/- 30th January 1914.

Hindu Law—Widow—Surrender of estate by, unless made with consent of all presumptive reversioners does not affect succession.

No surrender by a Hindu widow can affect the succession to the estate after her death, unless it has been made with the consent of all the presumptive reversioners at the time of the surrender: 10 Cal 1102; 30 All (P C) and 40 Cal 7211 Ref.

[P 159 C 2]

Sarosi Charan Mitter—for Appellants.

Kulwant Sahay, Raghunath Singh and Harnarayan Prasad—for Respondents.

Roe, J.—The property in dispute in this case is a one-third share of an eight annas share of the estate of one Santpratap. Santpratap had five daughters. In 1309 fasli three of them were already deceased; one only of the three left issue. Her name was Laljhari and the issue she left was a son, Ganesh Prasad. In 1309 a fourth daughter died by name Nawabjhari, wife of a person known as Taraji and mother of the two defendants known as Bachanji and Bachuji. This left one daughter only surviving by name Manjhari Kuar and she had no issue. The story of what occurred at the death of Nawabjhari is clearly told in Manjhari's evidence printed at pp. 14 and 15 of the paper-book and in the proceedings in mutation upon the death of Nawabjhari in respect of the eight-annas share of Santpratap's estate held during the lifetime of Nawabjhari as her life-estate. After Nawabjhari's death Taraji had made an urgent appeal to Manjhari to leave the estate as it was in the hands of the amlas who had been collecting the rent prior to the death of Nawabjhari. "You will not" he said, "be so unkind as to deprive the orphans of their means of livelihood." Manjhari replied.

"I do not propose to take over the estate left by Nawabjhari. What I will do is to leave it in the hands of the present amla. The collections must be devoted to the maintenance not only of Bachunji and Bachuji but also of Ganesh Prasad, the son of my sister Laljhari."

She then retired from the scene and would have nothing further to do with the dispute that arose in the Collector's Court. Taraji, on behalf of his two sons who were minors was strenuously urging the Collector to enter the names of Bachunji and Bachanji as in possession. Ganesh Prasad on his own behalf as a major was urging that inasmuch as Manjhari had insisted on his having a share in the usufruct of the property he should be entered as a one-third owner. The Collector finally accepted the arrangement proposed by Ganesh

Prasad and against that arrangement Taraji appealed on behalf of his sons. The final result of the case was that the Board of Revenue set aside the order of the Collector and ordered the name of Munjhari Kuar to be entered as the life-owner of the estate. Ganesh Prasad was at no time in possession of the property and when he died in 1311, his son the present plaintiff was unable to obtain possession. This son now institutes this suit to obtain the one-third share of the property which was held in life-estate by Nawabjhari Kuar, on the ground that the action taken by Manjhari Kuar upon the death of Nawabjhari constituted a surrender. It is patent that such a plea cannot be maintained. Whatever may be the meaning of *Nobokishore's* case *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1) or of *Bajrangi's* case: *Bajrangi Singh v. Manokarnika Bakhsh Singh* (2) or of *Debi Prasad's* case: *Debi Prasad Chowdhry v. Golap Bhagat* (3), one thing is manifest that no surrender by a Hindu widow can affect the succession after her death unless it has been made with the consent of all the presumptive reversioners at the time of the surrender.

From the papers before us it is clear that Bachunji and Bachuji through their father Taraji were strenuously protesting against Manjhari Kuar's attempt to invest Ganesh Prasad with an interest in the estate left after the death of Nawabjhari and anything done by her without the consent of the guardian of Bachanji and Bachuji cannot possibly prevent them from now entering upon the succession in accordance with Hindu law. The plaintiff's suit was rightly dismissed. The appeal is dismissed with costs.

Jwala Prasad, J.—I agree.

V.S./R.K.

Appeal dismissed.

1. (1884) 10 Cal 1102

2. (1908) 30 All 1=35 I A 1=11 O C 78 (P. C.)

3. (1913) 40 Cal 721=19 I C 273.

A. I. R. 1916 Patna 159

ROE AND JWALA PRASAD, JJ.

Mahomed Abdul Ghani and others—Plaintiffs—Appellants.

v.

Balmokund Sukul and others—Defendants—Respondents.

First Appeals Nos. 65 and 331 of 1914, Decided on 31st October 1916, from decision of 2nd Sub-Judge, Mozaffurpore, D/- 17th November 1913.

Civil P. C. (1908), O. 23, Rr. 1 and 3—Difference between proceedings under Rr. 1 and 3 explained.

The difference between proceedings under Rr. 1 and 3, of O. 23, Civil P. C., lies in the fact that under R. 1 a Court is dealing with the plaintiff only and under R. 3 a Court is dealing with the plaintiff and defendant together, and is considering whether there has been any agreement made between the plaintiff and defendant for an adjustment of the claim. As soon as a suit is instituted and a summons served upon the defendant, the defendant is entitled to claim any costs that he incurs by entering appearance. If by any agreement outside the Court a concession is made by the plaintiff on the one hand with regard to his claim and a concession made by the defendant on the other with regard to his costs, then there are present all the elements of a compromise. [P 160 C 2]

Lachminarain Sinha and Ganesh Dutta Singh—for Appellants.

Syed Hasain Imam, Baidya Nath Narain Singh and Siva Nandan Rai—for Respondents.

Judgment.—In this case Sheikh Muhammad Abdul Ghani and another were plaintiffs 1 and 2 and Suba Choudhry and another were plaintiffs 3 and 4 in a suit for a declaration that the kobala executed by the Mahomedan plaintiffs in favour of the defendants was void for want of consideration. The plaint set forth that on the date of filing it the Mahomedan plaintiffs had parted with all their right, title and interest in the property in favour of the plaintiffs 3 and 4 and that, therefore, the plaintiffs 3 and 4 would conduct the suit against the defendants. On 8th September 1913, 4th of November was put down as the next date for trial. On 15th of September a petition was filed by the Mahomedan plaintiffs to the effect that they had been soundly brought to task by their friends in the village for instituting a suit in which they had no possible chance of success and that their conscience smiting them upon this criticism of their conduct by the villagers, they went to the defendants who were graciously pleased to allow them to withdraw the suit and had in return for that withdrawal agreed to exempt them from the costs for which plaintiffs 1 and 2 would in the end have been liable. The order passed upon this petition was "put up on the date fixed." On the date fixed, 4th of November, the petition was put up, and it was after a full discussion and examination of witnesses on behalf of the plaintiffs, held on 17th November, that plaintiffs, 1 and 2 had in fact entered into an agreement

with the defendants whereby plaintiffs 1 and 2 should abandon the whole of their claim to the property in suit and the defendants on the other hand should abandon all claims that they might be entitled to press in the matter of costs. The suit of defendants 1 and 2 was accordingly dismissed in terms of the petition filed.

Plaintiffs 3 and 4 were then told to proceed with their suit and after waiting for half an hour the Subordinate Judge dismissed their suit also. In due course plaintiffs 1 and 2 appealed to this Court against the order declaring that the agreement filed was within the terms of O. 23, R. 3, and plaintiffs 3 and 4 filed a petition for re-hearing on the ground that they were taken by surprise on 17th November. The lower Court upon this petition of plaintiffs 3 and 4 for restoration of the suit came to the conclusion that that they had full knowledge that their case would be taken up as soon as the position of plaintiffs 1 and 2 had been declared and that they had ample opportunities for instructing their pleaders on the date on which the suit was struck off the file. It, therefore, dismissed the application for the restoration of the suit. Against this order also plaintiffs 3 and 4 appeal. Dealing first with the case of plaintiffs 1 and 2 the position taken by the *vakil* for the appellant is that if the proceedings were proceedings under O. 23, R. 1, then the order of the learned Subordinate Judge was bad, but that if they were in fact proceedings under O. 23, R. 3, then they appear to be in order and cannot be assailed in appeal. The difference between proceedings under Rr. 1 and 3 of this order lies in the fact that under R. 1 a Court is dealing with the plaintiff only and under R. 3 a Court is dealing with the plaintiff and defendant together, and is considering whether there has been any agreement made between the plaintiff and defendant for an adjustment of the claim. As soon as a suit is instituted and a summons served upon the defendant the defendant is entitled to claim any costs that he incurs by entering appearance. If by any agreement outside the Court a concession is made by the plaintiff on the one hand with regard to his claim and a concession made by the defendant on the other with regard to his costs we have then all the elements of a compromise. In the case before us it is

admitted by the plaintiffs that they had agreed in the presence of the defendants to give up their right in the property in suit and that the defendants had agreed in the presence of the plaintiffs to give up their right to costs.

We are satisfied that the proceedings in this case fell under O. 23, R. 3, and that the order of the learned Subordinate Judge was a proper order. The appeal of plaintiffs 1 and 2 must be dismissed with costs. Pleader's fee five (5) gold mohurs. With regard to the position of plaintiffs 3 and 4 we have it that 4th of November was the date fixed for the hearing of the suit as a whole and that on 4th of November it was recorded that parties were ready. They went on from day to day knowing that the proceedings regarding the adjustment of the plaintiff's claim (plaintiffs 1 and 2) was only a part of the contest and that they would be required to proceed forthwith with the main case as soon as the question of the compromise had been decided. This is clear from the fact that on 17th November four witnesses were present on behalf of plaintiffs 3 and 4.

In his examination-in-chief the plaintiff Suba Choudhry clearly says that there were two pleaders who were instructed in the case, Babu Sham Nandan and Babu Jogendra Chandra Mukherji. He ran to Jogendra Chandra Mukherji. That gentlemen said "I know nothing about your case so go to your pleader Sham Nandan." He then ran to Sham Nandan who said "I know nothing about your case." From these statements it is quite clear that plaintiffs 3 and 4 did not on 17th November take the ordinary precaution of instructing pleaders at all in spite of the fact that they knew that the case would be taken up that day. Such neglect must be regarded as gross and inexcusable. To condone such neglect would be to paralyse the efficient administration of justice. We have no hesitation in supporting the learned Sub-Judge in the attitude taken by him. The suit was rightly struck off the file and the appeal must be dismissed with costs. Pleaders' fee five (5) gold mohurs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 161

CHAPMAN AND ATKINSON, JJ.

Sital Prasad—Plaintiff—Appellant.

v.

Dildar Ali Khan and others—Defendants—Respondents.

First Appeal No. 148 of 1912, Decided on 17th March 1916.

Transfer of Property Act (1882), Ss. 10 and 108—Lease—Condition not to sub-let—No forfeiture or re-entry provided for breach—Held it was covenant against alienation and hence void—Damages for breach are claimable against lessee and not sub-lessee. — Per Chapman, J. Condition not to sublet is generally for benefit of lessor.

A lease of lands contained a clause that the lands so demised were not to be sub-let without the consent of the lessor but no provision was made by the lease for forfeiture or re-entry in the event of breach of the clause against sub-letting. The lessee however sub-let the lands without the consent of the lessor:

Held: that the clause against alienation in the original lease was a covenant and not a condition, that it was void within the meaning of S. 10, T. P. Act, and that therefore the sub-lease was valid and operative: [P 163 P 2 P 166 C 1, 2]

Held further: that for breach of the covenant not to sub-lease without consent of the lessor, the lessor was entitled to damages from the lessee and not from the sub-lessee. [P 164 C 1]

Per Chapman, J.—A condition against sub-letting is obviously for the benefit of the lessor if it provides for the re-entry of the lessor or for the forfeiture of the lease. But the mere existence of such a condition in general terms is not of itself sufficient to prove that the condition is for the benefit of the lessor. There must be something else, either in the circumstances of the case or in the nature of the property, or there must be something in the wording of the lease from which it might be inferred that the provision was intended directly for the benefit of the lessor. [P 163 C 1, 2]

Pugh and Ganesh Dutt Singh—for Appellant.

Hassan Imam, M. Muhammad Ishfaq and Ambika Prasad—for Respondents.

Chapman, J.—On 20th April 1906, Nawab Dildar Ali Khan executed a document reciting that on receipt of Rs. 4,000 by him the interests held by him in Mauza Aslampur Mahus were leased to Mir Sayyid Ali and another for a period of seven years from 1315 to 1321 Fasli. The document further provided that in 1321 Fasli the lessees should receive back from the executant the sum of Rs. 4,000 without interest, provided that the annual rent, which had been fixed at Rs. 4,000, had been fully satisfied. The document further provided that in that event the lessees should surrender the leased property. It was recited in the lease that the lessees should not sub-lease the pro-

perty without the permission of the executant.

On 10th August 1906, the lessees executed a sub-lease of this property in favour of Sital Prasad Singh. On 17th September 1906, Nawab Dildar Ali Khan instituted a suit for cancellation of both the lease and sub-lease. On 2nd August 1907, the Nawab obtained, in that suit, an interlocutory injunction restraining Sital Prasad from taking possession. On 20th December 1907, the Nawab withdrew his suit with permission to bring a fresh suit. The result was that the Nawab was left in possession of the property. In September 1910, Sital Prasad instituted the present suit for a declaration to title under his sub-lease and for possession and mesne profits. His suit has been dismissed and he now appeals to this Court. His case was that the sub-lease was executed in his favour with the consent of the Nawab. If this be so, no question of law would arise and he would incontestably be entitled to succeed. The evidence on this point consists of the statement of Mir Sayyid Ali to the effect that at the time when the Nawab executed the lease in his favour he gave a general consent to the execution of a sub-lease. The evidence is entirely uncorroborated and is inconsistent with the provision in the lease that the property was not to be sub-let without the Nawab's consent. Mir Sayyid Ali further stated that the Nawab subsequently gave his consent to the particular sub-lease in favour of Sital Prasad. But this was not stated by him in the evidence he gave on this point in December 1907 in the course of the suit instituted by the Nawab in that year, and the statement is inconsistent with the evidence he then gave. It is true that the Nawab withdrew his suit on the day after the evidence was given, but the petition for withdrawal indicates that Sital Prasad had shortly before, namely, on 30th November 1907, disclaimed all intention to interfere with the Nawab's possession and that it was this disclaimer that induced that Nawab to withdraw. The withdrawal therefore did not involve, directly or indirectly, any admission by the Nawab that Mir Sayyid Ali's evidence that he had consented to the sub-lease, was true. Sital Prasad has stated that he sent two of his servants to ascertain whether the Nawab had consented, and these two servants, Dwarka Singh

and Nilkantha Singh, have given evidence that they met the Nawab at the railway station on his return from a visit to Calcutta, and that in reply to an inquiry from them the Nawab informed them that he had consented to the sub-lease. This story appears to me to be improbable having regard to the fact that, admittedly, the Nawab soon after dismissed Mir Sayyid Ali from his service because he had executed this sub-lease, and thereupon the Nawab instituted a suit for the cancellation of it. Sital Prasad had previously tried to obtain a lease direct from the Nawab and had failed. The omission in the sub-lease of any mention that the Nawab's consent had been obtained makes it improbable that consent was given. I am satisfied that the learned Subordinate Judge's finding, that the sub-lease was executed without the consent of the Nawab, was correct.

Before dealing with the questions of law which arise in the case, it is desirable to deal with one more question of fact. Sital Prasad's case is that he obtained possession by virtue of the sub-lease on 28th June 1907. The learned Subordinate Judge has not accepted the evidence upon this point, and though the reasons stated by him are not entirely satisfactory I am of opinion that his finding is correct. The Nawab had instituted his suit for the cancellation of the sub-lease in September 1906; it is improbable that he would allow Sital Prasad to obtain possession on 28th June 1907. The evidence of possession consists mainly of the evidence of persons whose statement upon the point of consent I have already discredited. The only document in support of Sital Prasad's case upon this point is a Police report, dated 8th August 1907, to the effect that a breach of the peace was likely to occur in connexion with the dispute over this property between the Nawab and Sital Prasad. This report states that sweetmeats were distributed by Sital Prasad, and that Sital Prasad was having a pyne dug, and that his amlas were occupying the kutchery. It appears, however, from the evidence of the Sub-Inspector who submitted the report that the report was based upon hearsay. I see no sufficient reason to differ from the finding of the learned Subordinate Judge that Sital Prasad did not succeed in obtaining any kind of effective possession and in any event such possession as was

exercised by him must have been of a very temporary nature, inasmuch as, according to this own case, he did not commence to exercise possession until 28th June 1907, and an injunction restraining him from acts of possession was obtained in the Civil Court on 2nd August in that year.

Sital Prasad's position, however, is, it is contended, independent both of the question whether the Nawab consented to the sub-lease and of the question whether Sital Prasad ever obtained possession under the sub-lease. The contention is that the provision in the lease which the Nawab executed in favour of Mir Sayyad Ali, that there should be no sub-lease without the Nawab's consent, had no legal effect, and that in spite of that provision in the lease, Mir Sayyid Ali had the right to sub-let in favour of Sital Prasad, and that Sital Prasad obtained a good title by the sub-lease in his favour, whether the Nawab consented to it or not. The lease does not contain any provision for re-entry by the Nawab in the event of a sub-lease being executed without his consent, and there is not a single expression from which it might be inferred that it was the intention of the parties that the execution of a sub-lease without the Nawab's consent should result in a forfeiture. The provision against sub-letting is in the middle of a number of other provisions, all of which are of the nature of, what are termed in the English law, covenants as distinguished from conditions. If I were applying the English law to this case, I would hold that the provision in the lease upon the subject of sub-letting is a covenant and not a condition, and therefore the landlord's remedy in the case of a breach would be a suit for damages merely and not a suit for ejectment. The provisions of the Transfer of Property Act upon this subject are somewhat different from the English law, but the result is approximately the same. Under S. 108 (j) of that Act, every lessee in the absence of a contract or local usage to the contrary may transfer by a sub-lease the whole of his interest; and under S. 10 any provision in a lease restraining the lessee from exercising his right to sub-let is void, unless the condition is for the benefit of the lessor. Such a condition is obviously for the benefit of the lessor where it provides for the re-entry of the lessor or for the forfeiture of the lease.

I have already held upon a construction of the lease in favour of Mir Sayyid Ali that there is no provision, express or implied, either for re-entry or for forfeiture. The learned Subordinate Judge has held that the provision in the lease was for the benefit of the lessor, upon the ground that the lessor was afraid of introducing strangers on the leasehold property who might prove to be troublesome to him. But it does not appear that the property was of any peculiar kind, and the finding of the learned Subordinate Judge appears to have been based merely upon the character of Sital Prasad himself. It is clear from the terms of S. 10, T. P. Act, that the mere existence of a condition in general terms against sub-letting is not of itself sufficient to prove that the condition was for the benefit of the lessor. There must be something else, either in the circumstance of the case or in the nature of the property, or there must be something in the wording of the lease, from which it might be inferred that the provision was intended directly for the benefit of the lessor. The Nawab has nowhere said in his written statement or in his evidence in what way the covenant against sub-letting was for his benefit. He has not even said that it was, in fact, for his benefit. So far as the character of Sital Prasad is concerned the nature of the Nawab's objections to him varied from time to time. I am of opinion that there was no sufficient foundation for the finding of the learned Subordinate Judge that the condition in the lease against sub-letting, which was in general terms, was for the benefit of the lessor within the meaning of S. 10, T. P. Act. The result is that, as provided in that section, the condition was void.

Whether therefore I follow the guidance of the English cases, or whether I apply the terms of the Transfer of Property Act, the result in this case is the same, and that is, that the sub-lease in favour of Sital Prasad was a valid sub-lease. In this connexion I desire to refer to the case of *Basarat Ali Khan v. Manirulla* (1) in which three Judges of the Calcutta High Court held that in a case of this kind an assignee of a lease was entitled to succeed in a suit for recovery of possession from the lessor, in spite of the fact that the lease provided that the lessee should not make a transfer without

1. (1909) 36 Cal 745=2 I C 416.

the written consent of the lessor. In matters connected with titles to land I would not ordinarily venture to differ from a ruling of the Calcutta High Court, which recently exercised jurisdiction in the area in which the present litigation arose, for to disturb the condition of the law upon such questions would be to disturb many titles. In the present instance, moreover, the decision is undoubtedly correct. It has been argued on behalf of the respondent that it would be inequitable to allow Sital Prasad to succeed in this case, inasmuch as the Nawab is entitled to damages for the breach of the condition against sub-letting, but the Nawab is not entitled to damages for this breach as against Sital Prasad, he is entitled to such damages only against his lessees, Mir Sayyid Ali and his co-lessee who joined in the covenant not to sub-let and who are answerable in damages for the breach of that covenant. I am not satisfied that any case was made out either upon the pleadings or upon the evidence that Sital Prasad wilfully procured a breach of the covenant, and I do not say that if such a case had been made out the Nawab would have been entitled to damages as against Sital Prasad.

During the pendency of the appeal to this Court the term of the sub-lease has expired. If the sub-lease amounts merely to a sub-lease, Sital Prasad would not now be entitled to a decree for possession. It has been contended on his behalf that the sub-lease, though in form a sub-lease, in fact amounted to an assignment of mortgage, it being contended that the document executed by the Nawab in favour of Mir Sayyid Ali and another was, in fact, a mortgage. That document recited that Rs. 4,000 was paid to the Nawab as *zarpeshgi*. The contention on behalf of Sital Prasad is that the lease of the property in favour of Mir Sayyid Ali was by way of security to secure the repayment of this advance of Rs. 4,000. The contention of the other side is that the Rs. 4,000 was paid only by way of security in order to insure the payment of at least one year's rent by the lessees. The sum did not actually pass hands. It is admitted that the Nawab at the time of the execution of the document owed the lessees a sum of money in excess of Rs. 4,000, the Rs. 4,000 was merely credited in discharge of the debt to that extent. The document recites that the

Rs. 4,000 was by way of security for the rent. The Nawab is wealthy, and there is nothing to indicate that he was hard pressed for money. Upon the whole I am not satisfied that the document amounted to a mortgage. No doubt, if it had amounted to a mortgage Sital Prasad would have been entitled to recover possession, although the period had expired, inasmuch as the amount of Rs. 4,000 to secure the repayment of which the mortgage was executed, had not been repaid. I hold however that the document was not a mortgage. The result is that Sital Prasad is not entitled to a decree for recovery of possession. He is entitled only to a decree for mesne profits. The amount of the mesne profits will be ascertained by the first Court. In ascertaining the amount of mesne profits the learned Subordinate Judge will take into consideration the fact that, under assignment from Mir Sayyid Ali, Sital Prasad is entitled to Rs. 4,000 from the Nawab. I would not, however, award Sital Prasad any interest on this Rs. 4,000. He will also take into consideration that there was a rental payable by Sital Prasad to the Nawab of Rs. 4,000 a year for every year of the lease. From the year 1317 the Nawab appears to have leased the property to another person by the name of Deonath Sahai, but it was not distinctly pleaded that Deonath Sahai had anything to do with keeping Sital Prasad out of possession of the property and no such case was certainly made out against Deonath Sahai. The result is that the Nawab must be made solely responsible for the mesne profits. The appellant is awarded a decree for mesne profits as against the Nawab Dildar Ali Khan only, for the seven years 1315 to 1321 Fasli. His suit for possession of the property is dismissed and he is awarded costs, to be assessed in the final decree as if his suit had been only for the amount of mesne profits which will be finally awarded to him. His suit against Deonath Sahai is dismissed. Deonath Sahai is awarded his costs.

Atkinson, J.—The facts of this case so far as they are material are as follows: Defendant 1, Nawab Dildar Ali Khan, is the proprietor of eight odd annas share or interest in Mauza Aslampur Mahus and is also a lessee and sub-lessee of another share or interest in the same lands to the extent of two annas, 1 damri and

16 cowris under two pattas dated respectively 18th February 1902 and 25th January 1904. Thus the entire interest of the above defendant 1 in these aforesaid lands, the subject-matter of this suit, is 11 annas 10 cowris. Prior to September 1906 defendant 1 and Mir Sayyad Ali had certain financial dealings, as an outcome of which defendant 1 leased all his share or interest in the said lands to Mir Sayyid Ali and Muhammad Khan by a lease or patta dated 20th April 1906. I should revert to this document later and discuss its form and details. For the present, however, it is sufficient to state that the lease contains a clause that the lands so demised were not to be sub-let without the consent of defendant 1 as lessor, but no provision is made by this lease or patta for forfeiture or re-entry in the event of breach of the clause against sub-letting and the document itself purports to be irrevocable in its terms. On 10th August 1906 Sayyid Ali and Muhammad Khan purported to sub-let or assign to the plaintiff, Babu Sital Prasad, all their interest in the said lands so demised by the lease of 20th April 1906 by an indenture or patta dated 10th August 1906. The rent reserved by the latter lease of August 1906 reserved to the assignors or original lessees the rent of Rs. 4,250, the sum of Rs. 250 being the profit rent over and above the rent provided to be paid by the lease of April 1906. These are shortly the material facts. Three questions arise for consideration:

First, did defendant 1 Nawab Dildar Ali, consent to the assignment to the plaintiff on 10th August 1906? Secondly, did the plaintiff in pursuance of that assignment enter into possession of the said lands? and Thirdly, a question of law arising on the form of the lease of 20th April 1906, whether on the authorities, even though no consent was given by defendant 1, nevertheless the assignment or deed of sub-letting of 10th August 1906 was operative as an effective assignment of the lands to the plaintiff, Sital Prasad? It is unnecessary to review in detail all the facts of this case, but having carefully considered all the evidence adduced by the plaintiff and the defendants respectively and the documents on the record in the case itself, I am satisfied as a question of fact that defendant 1 did not consent to the assign-

ment to the plaintiff by the indenture of sub-letting or assignment dated 10th August 1906. Likewise I am equally satisfied that the plaintiff in pursuance of the title conferred upon and vested in him by the deed of 10th August 1906 did, in fact, enter into possession of the said lands and ultimately was ejected therefrom under an interlocutory injunction granted in a suit instituted by the defendant 1 against the said Sayyid Ali and Muhammad Khan and the plaintiff. This injunction was obtained on 2nd August 1907 and from that time up to the expiration of the lease of 20th April 1906 the plaintiff has been out of possession of the said lands. The suit instituted by the present defendant 1 was terminated by being withdrawn upon a petition made by him in that suit under and by virtue of a decree in that behalf dated 20th December 1907.

It now becomes necessary to consider the third question which is really one of law, pure and simple. Having regard to the finding that defendant 1 did not consent to the sub-letting of these lands to the plaintiff under the indenture of 10th August 1906 does that deed operate as a valid assignment to the plaintiff of the original lessee's interest in the said lands under the patta of 20th April 1906? The material parts of the document of 20th April 1906, are as follows: That in consideration of the lessees paying to defendant 1 as lessor Rs. 4,000 by way of security without interest, defendant 1 in this action leased all his said share or interest which he had in the said lands to Mir Sayyid Ali and Muhammad Khan for the term of seven years from 1315 to 1321 Fasli corresponding more or less to the years 1907-1908 and 1914-1915, and that upon the expiry of the demised term the sum of Rs. 4,000 so deposited as security was to be returned to the original lessees. Then amongst the list of covenants in the said indenture or patta the following words are to be found:

"The said lessees and sub-lessees shall not sub-lease the leased and sub-leased properties or take any one as shikmi partner without the permission of the lessor Nawab Dildar Ali Khan."

Now it will be noticed that this patta or lease contained no provision by way of forfeiture or re-entry in the event of the breach of the covenant recited. Mr. Imam contended that this clause operated as a condition, and not as a covenant and

sought to argue that the distinction between a covenant and condition is such that a clause providing for forfeiture and re-entry for breach of a covenant is unnecessary in the case of a condition, and that a condition without such a penalty can be enforced by ejecting the party in possession of the lands in breach of the condition. However, it is not really necessary to consider the argument as to the distinction between conditions and covenants, because in my opinion this clause against alienation, is clearly not a condition, but a covenant; but if it were a condition I think that Mr. Imam would have had some difficulty in reconciling his argument with the provisions of S. 11, Cl. (g), T. P. Act 1882. I, therefore, hold as a matter of law that upon the form of the deed of 20th April 1906 and upon its true construction the clause against alienation therein is a covenant and not a condition. Argument was addressed to us as to whether this document of 20th April 1906 was a lease or mortgage or partly a lease and partly a mortgage. In my opinion the document in its turn is more consistent with that of a lease than a mortgage; but really the matter is not of much importance in this particular case. Now then the final question arises for consideration, namely, did the sub-lease of 10th August 1906 operate as an effective and valid assignment or sub-letting to the plaintiff of the lands demised by the original patta or lease of 20th April 1906.

In my opinion, there being no clause providing a penalty by way of forfeiture or re-entry for breach of the condition against alienation in the patta of 20th April 1906, defendant 1 has only a claim sounding in damages for breach of contract against the original lessees by reason of their having sub-let or assigned their entire interest in the demised lands in breach of the covenant in that behalf viz., without the assent of the lessor, but that such breach of covenant against alienation does not operate in law to prevent an operative assignment of the lands to the plaintiff under the patta or lease of 10th August 1906, having regard to its form and to the absence of any penalty expressly being attached by way of forfeiture or re-entry. This is clear and undoubted law both in England and India and appears to me to be covered by authority. I refer to the case of *Williams v.*

Earle (2) and *Basarat Ali Khan v. Manir-ulla* (1). Thus the plaintiff by the patta of 10th August 1906 acquired a valid interest in the said lands in dispute in this action and was put for all purposes in the shoes of the original lessees and became bound by all the covenants in the original lease, and as between him and defendant 1 there arose out of this transaction the relationship of landlord and tenant grounded on privity of estate by reason of the covenant against alienation being a covenant running with the land. If it became necessary to decide the point which, in my opinion, it is not, I would be prepared to hold, having regard to S. 10, T. P. Act, 1882, that this covenant against alienation was in itself by the law of India void and not within the exemption or exception provided by that section. Because I think the words "for the benefit of the lessor" in that section must have some special significance and meaning which seems to me entirely absent in the present case.

The plaintiff claims a declaration of title and seeks by his plaint for a right to be restored to the possession of the lands which he acquired under the patta of 10th August 1906. It is worthy of note that the present suit was only instituted on 1st September 1910, almost three years after the termination of the prior suit, and when this action was started no doubt plaintiff rightly claimed the relief he sought; but the original term provided by the patta of 20th April 1906 has now expired. What, therefore, is the nature of the relief which we are bound to give to the plaintiff? I think clearly he is entitled to mesne profits from the time when he was entitled to possession up to the date when the lease expired, subject, of course, to the provision as to the payment of rent by him. We cannot ascertain or fix what the amount will be and I think that an enquiry must be directed to take an account and ascertain what the mesne profits will amount to. On the taking of such enquiry the plaintiff will be entitled to get credit for the Rs. 4,000 paid by way of security by Mir Sayyid Ali and Muhammad Khan, the original lessees, inasmuch as this sum has become vested in the plaintiff under the provisions of the patta of 10th August 1906. I desire to add that, in my opinion the Sub-Judge in this case misapplied and

misunderstood the law applicable to the facts of this case and, therefore, erred in the judgment he formed. It follows, therefore, in regard to the view which we hold that his decision must be reversed and that plaintiff declared entitled to the declaration I have indicated with costs. As against defendant 2, I think the action should be dismissed with costs. I desire personally to thank learned counsel on both sides for the assistance they have given me and for the consideration they have shown me. I am much indebted to both for their able argument.

v.S./R.K.

*Appeal allowed.***A. I. R. 1916 Patna 167**

MULLICK AND ATKINSON, JJ.

Mt. Diltor Koer—Plaintiff—Appellant.

v.

Harkhoo Singh—Defendant—Respondent.

First Appeals Nos. 49 and 159 of 1913, Decided on 13th November 1916, from decision of Third Sub-Judge, Patna, D/-30th September 1912.

(a) Civil P. C. (1908), O. 8, R. 6 (1)—“Ascertained sum”—Meaning explained.

The expression “ascertained sum” in O. 8, R. 6 (1), means an amount which is beyond challenge and beyond dispute, concluded and conclusive. [P 169 C 1]

(b) Civil P. C. (1908), O. 8, R. 6—Suit for rent—Defendant can claim set-off in respect of payments made on plaintiff's behalf qua property which he holds under law.

A set-off can be claimed on the basis of a contractual relation between the parties. In the absence of such a contract, there is a right to an equitable set-off when the set-off arises out of the same transaction out of which the claim springs. If it is found that the set-off is foreign to the original claim, the set-off will not be allowed. [P 169 C 1]

In a claim for rent due by a tenant under a lease, it is not open to the latter to plead a set-off of amounts due to him by the plaintiff on accounts in respect of payments made on the plaintiff's behalf in respect of other properties which are not the subject-matter of the suit. The defendant can, however, claim a set-off in respect of payments made on the plaintiff's behalf qua the property which he holds under him. [P 168 C 2]

(c) Trust—Creation of—Volunteer managing property of another becomes trustee and liable to account for management.

A volunteer acting in the management of another's property, without remuneration, becomes clothed with the character, position and capacity of a trustee and is deemed in law a constructive trustee, and as such, is undoubtedly liable and bound to account for the management of the property committed to him. Voluntary service is the foundation underlying all trusteeship and the law precludes a trustee from making a profit or acquiring a benefit from his office as trustee.

The fact of the payment of a salary affords no test in determining the liability to account. [P 170 C 2]

D. N. Mitter, Purnendu Narain Sinha, Ram Prasad and Baikuntha Nath Mitter—for Appellant.

Sarat Chandra Bysack, Hari Bhusan Mukerji and Guru Saran Prosad—for Respondent.

Atkinson, J. — A gentleman called Tundun Singh died prior to 19th April 1891, leaving a widow and three daughters surviving him. The plaintiff is the second daughter, the third daughter Muntor Koer is dead, having died in December 1906, and the eldest daughter is also dead and is represented by her son. Upon the death of Tundun Singh, a family arrangement was arrived at and embodied in a written agreement dated 19th April 1891, whereby all the property of Tundun Singh save, four denominations, was equally divided amongst his three daughters, each of whom took a share to the extent of 5 annas 4 pies. The plaintiff Diltor on 5th April 1892 leased her one-third share of that property to the defendant Harkhoo Singh. The plaintiff's one-third share represented 61 villages in all, and the rent reserved by the lease was Rs. 3,975 per annum payable in various proportions on the dates specified in the deed itself. There is no dispute as to the validity of the deed. The defendant entered into possession of the lands and continued to hold the lands under the lease for the term of seven years; and he remained on in possession after the expiration of the lease and is in possession still of the lands, and the rent that is sought to be recovered is the rent for the years 1315 and 1316 Fasli.

The defendant also admits that he is liable, since the period when the lease expired, to hold the lands subject to all the provisions and terms embodied in the lease itself. Accordingly the plaintiff in action No. 49 of 1913 seeks to recover Rs. 6,114-11-0 for arrears of rent due for the years that I have already mentioned, and that sum of Rs. 6,114-11-0 is arrived at after the plaintiff has given the defendant credit for payment of Government revenue. Primarily, the plaintiff would be bound to pay all the charges affecting the property, namely, Government revenue, road cess, and whatever superior rents might be payable in respect of the same, and in so far as the defendant has

paid Government revenue and road cess, or has paid any superior rents so far as they affect the thika properties, of course as against the rent due, he must be entitled to get credit for such payments, because the obligation to make all such payments is not upon him but upon the plaintiff, who is the proprietor or owner of this property. It seems a very simple matter, and one would have thought that it was a matter easily disposed of within a reasonable limit of time. However, it has taken over six years for a simple claim for rent payable under a lease to be disposed of in the subordinate Courts. The defendant's defence to this action for rent is one of a very extraordinary character, unless indeed the defendant is clothed with the authority and occupies the position which the plaintiff alleges he does in the corresponding Suit No. 159, namely that of an agent, manager or trustee. The defendant's defence to the action shortly stated is:

"I was your lessee of the leased lands, but I consented to pay in respect of your other properties (which I will refer to in a moment) all the charges that might affect them, and that whatever payments I made in respect of those properties I was to be entitled to set-off by way of payment as against the rent payable by me to you under the lease."

It appears that in the year 1891 the plaintiff purchased a 5 annas share in three villages, Dibra, Shahpur and Fatehpur, and also that upon the death of her sister Muntor, childless, she inherited the 3-annas share which that lady also bought in these same villages, as well as her one-third share in the family property settled by the agreement of 19th April 1891. These properties have been referred to in the course of the argument as the non-thika properties. The defendant's case or defence is, that he was to make all payments which could be properly claimed against the plaintiff in respect of these non-thika lands, whether by way of wages for servants, or Government cess or road cess or superior interests, and he avers in the claim that he was to pay them, and the payments which he made was to be entitled to set-off as against the rent payable under the lease of 1892. The plaintiff denies that contention altogether, and says that the payments the defendant may have made form the subject-matter of a different transaction, that the defendant was to pay her rent under his contract and that

whatever claim he had for acting as her manager was to be settled in a different proceeding and on a different basis entirely. Dr. Bysack in a very strenuous argument has suggested that really the only question for the determination of the rent suit is whether or not the contract that was made between the plaintiff and defendant was the one which is pleaded in paras. 3 and 4 of the written statement, or is the simple contract alleged by the plaintiff. In fact he says that the real thing is this, that the disbursements to be made by the defendant in respect of the non-thika properties were to be made by way of a settlement of the rent due under the lease. Well, we do not at all hold with that view. We think that there was no such contract made between the parties as is alleged in the written statement and as has been contended for here.

We think the case is one of a simple lease made between landlord and tenant, whereby the tenant contracts to pay rent to his landlord and that if the defendant as tenant makes payments on his landlord's behalf *qua* the property which he holds under him, that, therefore only to that extent is the defendant entitled to set-off as against the rent due what sums he has paid. I have indicated the nature of the items to be set-off, but in order to emphasize it I desire to draw particular attention to the fact that the claim is conversant only with the thika properties. Therefore the first question which appears to us to require an answer is, what was the contract between the parties? Was the defendant to pay all the expenses and outgoings of all the plaintiff's property and set-off the same as against the thika rent? or was the defendant only to pay outgoings and Government demands of the thika properties and set-off the same as against the thika rent payable by the defendant to the plaintiff? We are of opinion that "yes" is the proper answer to be given to the second question and "no" to the first, namely that the set-off as against the thika rent is only conversant with payments made by the defendant in respect of the thika properties and no other.

Then in the written statement an attempt is made by way of further defence to set off as against the rent due a very large sum which is claimed in very loose and ambiguous terms, and so far as it pur-

ports to be a set-off seems to be directly in violation of every rule of pleading. The defendant says:

"You owe me on a general account items amounting to Rs. 18,000 odd. I will set off as against your rent so much; it leaves you a debtor in my hands of Rs. 9,145 and, therefore, I owe you nothing, and your action for rent must be dismissed."

It is impossible to tell how the claim of set-off is made out, no details are given, it is lacking in precision, and some of the items appear to have been arrived at in a very scratchy way. No one single item seems to us to be verified or vouched, nor can it be said to be ascertained, ascertained in the sense that it is beyond challenge or dispute. But the items which are claimed to be set off are items not connected with the thika property but with general disbursements made by the defendant in his capacity as the plaintiff's agent or trustee. We do not think that the various sums that are sought to be set off are in themselves what are termed in law "ascertained sums;" nor are they within the express provisions of S. 111, Civil P. C., sufficiently ascertained to justify and entitle the defendant to claim a legal set-off as distinct from an equitable set-off. Dr. Bysack did not argue whether he had the right to an equitable set-off. He was very strenuous in his argument that he ought to be entitled to set-off by way of rent what he claims to have paid on foot of Nowratan's decree. I do not see why that claim should be allowed at all. It is certainly not an ascertained sum in the sense that it is beyond dispute. He claims it as a definite sum; it may be, I feel sure it will be, hotly contested that the amount allowed by the Subordinate Judge is not in itself the amount for which he ought to get credit. Therefore, this item cannot be said to be ascertained; ascertained, as I have said, means beyond challenge and beyond dispute, concluded and conclusive. Well, that being so, we do not think that a right to an equitable set-off can exist in this case, because the right to equitable set-off is founded upon the condition that the set-off must arise out of the same transaction out of which the claim springs. If it is found that the set-off is foreign to the original claim, then the Courts of equity prior to the Judicature Act in England did not allow the set-off. Here the set-off springs not under the contract created by the lease of 1892, but out of a

claim arising from a breach of trust, in a totally different matter under a totally different right, and in respect of totally different property. Therefore, an equitable set-off is entirely out of this case; in fact the whole of the defendant's alleged claim to set-off appears to me to be more in the nature of a counter-claim than a set-off. That really disposes of the action for rent. I shall indicate in a moment the form of direction which we will give and the case must be sent back to ascertain what are the specific items for which the defendant is to have credit as against the rent due.

The next question is, was the defendant manager, agent or trustee for the plaintiff in the management of what has been referred to as the non-thika property? Dr. Bysack contends that he was not, that he was never clothed with the character of an agent, that he was never manager, and that what he did was done more or less as a matter of friendship or as a mode of paying his rent, that it never imposed any obligation or duty upon the defendant. But the Judge in this finds as a fact that Harkhoo Singh, the defendant, did look after the plaintiff's *sir* property not a manager but as a relative. I got lost in my endeavour to find out what the learned Judge meant by that "not as manager but as a relative." I think, viewing the evidence in its entirety and having studied it with the greatest possible care, not only from the point of view of the plaintiff but from that of the defendant also, and having gone through every single exhibit referred to in the case, that it is obviously plain that Harkhoo Singh managed and controlled the plaintiff's property. Whether he did so for a reward payable under an express contract does not satisfactorily appear, but what is established by the evidence of the plaintiff's and defendant's witnesses is, that by his actions and conduct the defendant put himself in a fiduciary capacity towards the plaintiff in reference to the management of her non-thika property. He received the rent and profits of her property; he exercised control and domination in his relationship with the tenants, his order and mandate prevailed, and the patwaris and gomasthas in their diverse capacities acted in obedience to his direction and order. The defendant instituted rent suits on behalf of the plaintiff against the tenants, and general-

ly conducted and controlled the course of the litigation; and if money was required, demanded it for the purpose. Most significant of all, however, are the three revenue chalans of 1907 and 1909, which show payments of revenue by the defendant of the non-thika property as agent for the plaintiff. By what right, by what authority did he, the defendant, make these payments unless he had put himself in the position of manager of this lady's property, thereby acting as her trustee? However one fact can never be lost sight of in this case, that in Fasli 1311 the defendant rendered his account, having rendered antecedently five prior accounts, on the basis of his liability to account. The account was settled and the parties were satisfied, and what is asked and prayed for by way of relief in this suit is an account by the defendant for the years 1312 to 1316 Faslis, that is, from the settlement of the last account in 1311. Ex. 16 (a), page 81, clearly, I think, points to an admission by the defendant of his liability to account, as also Ex. 15 (a), page 78, and Ex. 20 at page 85. It may be said that these Exhibits refer to a period antecedent to the period of account sued for in this action. That fact, admittedly true, is wholly immaterial, because these documents are only relied upon to establish the genesis and origin and nature of the relationship and its character existing between the plaintiff and the defendant in their dealings with the plaintiff's property. We shall not attempt to take the account or investigate its bona fides or accuracy. All we decide in these two actions is the main outstanding feature of liability—the liability for rent and the liability on the defendant's part to account.

The relationship between the defendant and the plaintiff is somewhat mixed. He was a cousin and a kinsman. She was a purdanashin lady living a considerable distance from the property in suit; and naturally she would look to the defendant, who is her kinsman and who had managed the property for her mother in her lifetime and who had managed the property for her sister, and the natural thing for her to do would be to look to the defendant to assist her in the management of her property in the way he did. Dr. Bysack relied very strongly upon an admission made by the plaintiff's husband at page 125, line 12, of his evidence that

he used to manage his wife's property. I think that an entirely erroneous importance has been attached to that admission. I think that what the plaintiff's husband meant and said was, that as between the defendant and the plaintiff he used to conduct the negotiations with the defendant on behalf of the plaintiff but that he never acted in regard to the plaintiff's property as the defendant himself did. The learned Judge who tried this case seems to have erred lamentably in his view of the law touching the defendant's liability to account, having regard to the defendant's admissions which are not denied, because it is sworn to specifically by Muneshar Lall and by the plaintiff's husband that the defendant admitted he was asked to manage the plaintiff's *sir* property.

The learned Judge seems to have thought that to establish the defendant's liability to account as manager it was necessary, in support of the plaintiff's case, to prove or establish a contract appointing the defendant manager at a fixed salary or scale of remuneration, because he seems to imply that if a relative acts voluntarily without remuneration in the management of his kinsman's property, no question of liability to account would arise. Of course if that was the view of the learned Judge he was hopelessly wrong. No doubt a manager appointed at a salary is one thing, but it is equally certain and different that a volunteer acting in the management of another's property without remuneration becomes clothed with the character, position and capacity of a trustee, and is deemed in law a constructive trustee, and as such is undoubtedly liable and bound to account for the management of the property committed to him. The fact of the payment of a salary affords no test in determining the liability to account. Voluntary service is the foundation underlying all trusteeship, and the law precludes a trustee from making a profit or acquiring benefit from his office as trustee.

Therefore, we are clearly of opinion that the Subordinate Judge erred in law in finding that the defendant was not liable to account. The Judge finds as a fact that the defendant did manage the plaintiff's property as a relative. Taking this finding of fact coupled with the evidence and documents submitted in evidence by both sides, we are clearly of

opinion that the defendant occupied the position of a constructive trustee in law, and by reason thereof he has clearly to account for all moneys which he ought to have received, which he did receive, and which he disbursed in the due course and management of the property. To allow this decree to stand would be a defiance of justice and the negation of equity and good conscience. Dr. Bysack says in effect, "I will account for whatever moneys I have received." If this decree were to stand the defendant would not be called upon to account for a single penny. Dr. Bysack's own admissions show that his client is liable to account for something; he does not know to what extent. But if he hold, as we have held now, that the defendant is in the position of a manager and has been acting as a manager of this lady's property, then he must account. That he has made disbursements, I think, is beyond doubt. If he is an honest defendant he can very well discharge himself of the burden the law casts upon him, if he cannot then he must suffer.

Accordingly we think the form of the decree in this case should be as follows. In Suit No. 49 of 1913 we decree the rent suit qua the thika properties, subject to the defendant's right to set off as against the rent due all revenue and other outgoings primarily payable by the plaintiff in respect of the same but in fact paid by the defendant during the years 1315 and 1316 Faslis. We shall remand the case to have the defendant's claim ascertained, and direct that upon ascertainment the same should be set off as against an adequate part of the rent due, and the plaintiff shall thereupon be entitled to a decree for the balance so found due. We shall direct this inquiry to be expedited and disposed of without delay. The plaintiff will be declared entitled to her costs of the rent suit in the lower Court, and also of this appeal and of the inquiry now directed. We decline to put any stay upon the execution of that decree for rent. In Suit No. 159 of 1913 we shall declare the plaintiff entitled to the account claimed by her plaintiff for the years 1312 to 1316 Faslis as against the defendant in respect of the property mentioned in para. 8 of the plaint, with liberty to the defendant to file an account by way of discharge, if so advised, of all disbursements made by him as agent, manager or trustee in respect of the said property.

We shall remand the case to the Subordinate Judge to have the account taken and we shall direct him to proceed with the hearing of this matter as expeditiously as possible. The costs in the lower Court and of this appeal and of taking of the account will abide the issue of the taking of the account.

Mullick, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1916 Patna 171

CHAMIER, C. J. AND SHARFUDDIN, J.

Imrat Ali—Petitioner.

v.

Amjad Ali—Opposite Party.

Criminal Ref. No. 42 of 1916, Decided on 13th December 1916.

Criminal P. C. (1898) Ss. 133 and 139—Claim for right—Proceeding under S. 133—Magistrate should determine if claim is bona fide and whether road is public.

Before any proceeding can be taken by a Magistrate under S. 133 or, at all events, before any reference can be made to a jury, it is incumbent on the Magistrate himself, when a claim for right is set up, to determine whether that claim is bona fide or not, and whether the road or pathway is a public pathway or not. It is not open to the Magistrate to leave the decision of that question to a jury appointed under S. 133, Criminal P. C. [P 171 C 2]

Judgment—This is a reference by the Sessions Judge of Purnea in a case which was instituted under S. 133, Criminal P. C. The Deputy Magistrate is perfectly correct in saying that there is no express provision of law directing the adjudication of *bona fide* claim made by the opposite party, before sending the case to a jury but it is too late to go back upon a long line of cases in at least three of the High Courts in India, which lay down that before any proceeding can be taken by a Magistrate under S. 133, Criminal P. C., or at all events, before any reference can be made to a jury it is incumbent on the Magistrate himself, when a claim for right is set up, to determine whether that claim is bona fide or not and whether the road or pathway is a public pathway or not and that it is not open to the Magistrate to leave the decision of that question to the jury appointed under S. 138, of the Code. We, therefore, set aside the proceedings of the Deputy Magistrate and direct that he restore the case to the pending file and dispose of it according to law.

V.S./R.K. *Proceedings set aside.*

A. I. R 1916 Patna 172

MULLICK AND ATKINSON, JJ.

Haradhan Mandal Modak—Plaintiff
—Appellant.

v.

Iswar Das Marwari — Defendant —
Respondent.

Appeal No. 2421 of 1915, Decided on 1st December 1916, from appellate decree of Addl. Dist. Judge, Manbhum, D/- 7th June 1915.

(a) **Civil P. C. (1908), O. 41, R. 23** — Appellate Court cannot send case for further evidence and cannot ask Trial Court to pass another decree.

Under the provisions of O. 41, R. 23, all that an appellate Court is empowered to do is to frame an issue and to send it down to the Court below for the return of a finding; it is not competent to remand a case for further evidence and to require the Trial Court to pass another decree. [P 173 C 2]

(b) **Specific Relief Act (1877), S. 9** — Suit under S. 9 barred — Plaintiff can rely on—**Evidence Act (1872), S. 110.**

A plaintiff who has omitted to sue under S. 9, Specific Relief Act, when first dispossessed, can, after the summary relief under that section is barred by limitation, rely in a regular suit for ejectment on S. 110, Evidence Act, and as soon as he has proved that the defendant has dispossessed him, the onus is thrown on the latter to prove his title. [P 173 C 2]

(c) **Possession—Physical, Juridical — Burden of proof.**

Juridical possession is sufficient to throw on the defendant the onus of proving a better title. [P 173 C 1]

Where possession has been obtained without force or fraud, the person in possession is entitled to maintain it against all comers except the true owner: 12 *All.* 51 (P. C.), *Foll.*; 25 *Bom.* 287; 28 *All.* 157 and 23 *Mad.* 179, *Rel. on. Asher v. Whitlock*, (1865) 1 Q. B 1; *Appr.* 6 I. C. 806 and 10 I. C. 469, *Ref.* 7 I. A. 73, (P. C.), *not Foll.* [P 173 C 1]

Siva N. Bose and Mirtunjoy Chatterji —for Appellant.

Abani Bhusan Mukherji—for Respondent.

Mullick, J.—This appeal arises out of a suit relating to a house. It is found as a fact by the learned Additional District Judge in his appellate judgment that Lakhsman was the owner of the house, that after the latter's death it descended to his son Keshab, and that after Keshab's death, which took place about nineteen years before the suit, Lakhsman's widow Bidhumukhi was in possession as life-tenant. The plaintiffs made a case in their plaint which is not altogether clear. In one portion they alleged that Lakhsman and his brother Nader Chand were joint owners of the house; if that was so, Nader Chand would

seem to have had a half share in it. In another portion of their plaint they alleged that Nader Chand's three sons, Iswar, Maheswar and Mahindir, jointly acquired title to the whole house after the death of Keshab, and that each of these three brothers was entitled to a one-third share. On the footing that Nader Chand had only a half share, the three brothers would be each entitled to a one-sixth; whereas on the footing that the three brothers had jointly acquired by adverse possession or otherwise a full title to the house they would be entitled to one third. However in the prayer portion of the plaint the plaintiffs ask for a decree on the basis that their vendor Maheswar was entitled to a one-third share, and that is the claim which the learned vakil appearing for them makes before us.

The defendants are purchasers from Giribalba, the widow of Mahindir. They allege the adoption of Mahindar by Bidhumukhi, and claim that the whole house belonged to Mahindir. The Munsif decreed the suit for a one-third share. On appeal the learned Additional District Judge found that the story of the adoption of Mahindir was false. At the same time he was unable upon the evidence before him to come to a conclusion as to the title of the plaintiff's vendor and he remanded the case to the Munsif with directions to determine whether Maheswar was entitled, as reversioner to the last full owner Keshab, to any, and if so, what share of the house. The present second appeal is preferred by the plaintiffs on the ground that the remand order was illegal and contrary to the provisions of O. 41, R. 23. It is quite clear that this contention must prevail. The learned Additional District Judge was not competent to remand the case for further evidence to the Munsif, and to require him to pass another decree. All that the learned Additional Judge was empowered to do was to frame an issue and to send down that issue to the Court below for the return of a finding and it was his duty, after receiving that finding to dispose of the appeal upon the evidence before him.

But the learned vakil for the appellants goes further, and urges two reasons why his clients should get a decree for a one-third share in the property without being required to give further proof.

of title. The first reason is that there was twelve years' adverse possession by Maheswar, Iswar and Mahindir against Keshab and his heirs of reversioners. Now, upon this neither of the Courts below have come to any finding and there is no issue which would indicate that any such question was litigated before them. The learned vakil next asks us to remand the case for such a finding, but I think it would be improper on our part to do so in second appeal and to give the case a new shape altogether.

Then the learned vakil falls back upon his second ground, namely, possession short of twelve years before and after Bidhumukhi's death. Now this raises an interesting question of law, namely, whether a plaintiff who has omitted to sue under S. 9, Specific Relief Act, when first dispossessed can after the summary relief under that section is barred by limitation, rely in a regular suit for ejectment on S. 110, Evidence Act; and as soon as he has proved that the defendant has dispossessed him, is the onus thrown upon the latter to prove his title? In other words, does S. 110 contemplate juridical or de facto possession? In the High Courts of Bombay, Allahabad and Madras the weight of authority seems to be in favour of the view that juridical possession is sufficient to throw upon the defendant the onus of proving a better title, and the exhaustive judgment of Jenkins, C. J., in *Hanmantav v. Secretary of State* (1) seems to me to contain a very cogent and clear exposition of the law. Indeed, if I may say so with the greatest respect, the question was settled by their Lordships of the Privy Council in *Sunder v. Parbati* (2) so far back as 1889, where their Lordships cite with approval *Asher v. Whitlock* (3) and observe that where possession has been attained without force or fraud, the person in possession is entitled to maintain it against all comers except the true owner.

This principle has been more recently affirmed in *Gobind Prasad v. Mohan Lal* (4) and in *Mustafa Saheb v. Santha Pillai* (5). In the Calcutta High Court the trend of opinion is on the whole

otherwise, and the general view is, that if a plaintiff is out of possession at the time of the suit the onus of proving title is on him; but that if he is in possession the onus is shifted on to the defendant. Recently however a note of dissent has been struck in *Shama Charan Roy v. Surja Kanta* (6) where the Court doubted whether the case of *Wise v. Ameerunnissa Khatoon* (7), on which the earlier Calcutta view purported to have been founded, really supported it, and if so, whether it had not been overruled by *Sunder v. Parbati* (2). The question came up again in 1910 in *Manak Borai v. Bani Charan Mandal* (8), but the Court did not decide it and reserved for future consideration the effect of the judgment in *Sunder v. Parbati* (2). Having regard, therefore to the state of the authorities, I am satisfied that if the plaintiff can prove joint possession with Mahindir or his successors at the time of the alleged dispossession, he will be entitled to succeed, unless the defendant can prove a better title.

The position therefore is this, the order of remand is wrong and must be set aside; the case must go back to the learned Additional District Judge for a hearing upon the evidence before him. He will not be competent to remand the case to the lower Court either for additional evidence or for findings on any issue. The learned Additional District Judge will be restricted solely to the case made by the parties and disclosed by the evidence adduced before the Munsif. Upon that evidence he will find, firstly, whether the plaintiffs have established the title of their predecessor, and secondly, whether upon mere possession they are entitled to a decree for one-third or any other share against the defendants. Costs will abide the result. We direct that the Court below do dispose of the case within two months of receipt of the record.

Atkinson, J.—I concur.

V.S./R.K.

Case remanded.

6. (1910) 6 I C 806.

7. (1879-80) 7 I A 73 (P.C.).

8. (1911) 10 I C 469

1. 25 Bom 287

2. (1890) 12 All 51=16 I A 186 (P.C.).

3. (1865) 1 Q B 1=35 L J Q B 17.

4. (1902) 24 All 157.

5. (1900) 23 Mad 179.

A. I. R. 1916 Patna 174

MULLICK, J.

Naik Pandey—Plaintiff—Appellant.

v.

Bidya Pandey and another—Defendants—Respondents.

Second Appeal No. 1277 of 1914, Decided on 11th April 1916.

(a) Bengal Tenancy Act (8 of 1885), S. 58 (3)—Nature of inquiry—It is prosecution for an offence.

A summary inquiry by a Collector under S. 58 (3), Ben. Ten. Act, on the application of a tenant is in the nature of a prosecution of the landlord for an offence within the meaning of that term in the Penal Code : 9 C. W. N. 816, *Foll.* [P 175 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 58 (3)—Discharge of landlord without awarding compensation—Suit to recover is not barred.

The discharge of a landlord under S. 58 (3) without award of compensation does not bar the landlord's right to recover the same by proceedings in a civil Court, the cause of action being referable to tort. [P 176 C 1]

(c) Malicious Prosecution — Absence of reasonable and probable cause—Presumption arises from discharge under S. 58 (3) of the Act of 1885—It is a question of law to be decided by Judge.

Malice and absence of reasonable and probable cause follow as an inference of law from the finding that a complaint under S. 58 (3), Ben. Ten. Act, is false. These are questions not for the jury, but for decision by the Judge as questions of law : 25 *Bom.* 332, *Expl.*; 28 *Cal.* 591 ; 6 *I. C.* 675 ; *Lister v. Perryman*, (1870) 39 *L. J. Ex.* 177 and *Brown v. Hawkes*, (1891) 2 *Q. B.* 718, *Ref.* [P 175 C 1]

(d) Bengal Tenancy Act (8 of 1885), Ss. 56 and 58 (3)—Existence of decree for rent operates as res judicata in proceedings under S. 58 (3)—Civil P. C. (5 of 1908), S. 11.

The existence of a decree against a tenant for rent, in respect of which receipts are claimed under S. 56, operates as res judicata of the fact of its payment in subsequent proceedings held under S. 58 (3) of the Act. [P 174 C 2]

Rajendra Prasad—for Appellant.*Baidyanath N. Sinha*—for Respondents.

Judgment.—The plaintiff is the landlord and the defendants are the tenants. On 19th April 1912, the defendants made a complaint to the Collector against the plaintiff, stating that they had paid Rs. 24 to the plaintiff on account of rent for 1319 Fasli, but that the plaintiff in spite of demand had refused to give them a printed rent-receipt. The plaintiff was summoned by the Collector in accordance with the provisions of S. 58, Ben. Ten. Act, but on 7th July 1912 the case was dismissed for want of prosecution. The present suit was instituted

on 21st September 1912 for damages for malicious prosecution in respect of the above complaint. The Munsif found for the plaintiff and decreed a sum of Rs. 100 as a damages. Against that decree both sides appealed. The Subordinate Judge who heard the appeals found that the allegation of the tenants to the effect that they had paid the rent for 1319 Fasli was true and that the landlord had contravened the provisions of the Bengal Tenancy Act in refusing to give them a printed rent-receipt. The Subordinate Judge accordingly dismissed the suit. Against this decree the plaintiff prefers the present second appeal. A very material fact in the case is that on 30th June 1913 the landlord obtained a decree against the defendants for the rents of the years 1316 to 1319 Fasli inclusive; that decree was not appealed against and is final, and on behalf of the plaintiff it is urged that it operates as res judicata of the fact of payment of Rs. 24 alleged by the defendants. In my opinion this contention must prevail. It is argued by the learned vakil for the respondents that no issue in the present suit was directly and substantially in issue in the rent-suit and that, therefore, S. 11, Civil P. C., cannot apply. Now what is the material issue in the present suit. It is issue 3 which runs as follows :

“Whether the proceedings under S. 58 of Act 8 of 1885 were initiated falsely, maliciously and without reasonable and probable cause.”

It is true that this issue was not in issue in the rent-suit, but the decision of this issue depends on the question whether the defendants' allegation as to payment of rent for 1319 Fasli is true or false and that matter was certainly directly and substantially in issue in the rent suit. The vital matter in the present suit is the fact of payment, and it is admitted that that was certainly the matter directly and substantially in issue in the former suit. I cannot see that the matter of the payment is collateral or incidental in the present suit. So it being admitted that the Munsif who tried the rent-suit had jurisdiction to try the present suit also, the defendants cannot escape the operation of S. 11, Civil P. C. I hold that it was not open to the learned Subordinate Judge of the Court below to find that the tenants had paid the Rs. 24 alleged to have been paid on

account of rent for 1319 Fasli. If that finding goes, then it follows that the plaintiff in the present suit must get a decree. There could not have been any reasonable or probable cause for laying the complaint under S. 58, Ben. Ten. Act, and I agree with the reasonings of the learned Munsif as to the absence of such reasonable and probable cause. I also agree with the learned Munsif's reasons for inferring that there was malice on the part of the defendants. It has been contended by the learned vakil for the respondents before me that the questions of reasonable and probable cause and of malice are questions of fact, which the learned Subordinate Judge was competent to determine and in respect of which his findings cannot be interfered with.

Now as I have already observed, the learned Subordinate Judge's judgment is vitiated by an error of law and cannot be supported. But I do not think it necessary that I should remand the appeal again for re-hearing because the question of reasonable and probable cause as well as that of malice is a question of law to be determined upon certain facts found. Here I have found that the complaint of the defendants of 19th April 1912 was false. In my opinion it follows from this as an inference of law that there was no reasonable or probable cause for making the complaint. In my opinion it also follows that there was malice on the part of the defendants in the circumstances in making the complaint. Although there are certain expressions used in *Pestonji Muncherji Mody v. Queen Insurance Co.* (1) to the effect that in India in trials without a jury the question of reasonable and probable cause and malice becomes a question of fact, it is clear that those expressions were used only in reference to the propriety of a certificate for appeal to the Privy Council. The ruling in fact expressly accepts the general doctrine that the question of reasonable and probable cause and of malice is one for the Judge, a question of law. That has been also held in the case of *Harish Chunder Neogy v. Nishi Kanta Banerji* (2), where the High Court in second appeal proceeded to consider whether the Court of first appeal was right upon the facts in

deciding whether there had been reasonable and probable cause and malice. The case of *Shama Bibi v. Chairman of Baranagore Municipality* (3) is also to the same effect. And the English cases of *Brown v. Hawkes* (4) and *Lister v. Perryman* (5) lay down what are the functions of the Judge and jury in England in cases of this kind. I am of opinion, therefore, that it is unnecessary for me to remand the case to the lower appellate Court and that it is competent to me to set aside the decree of the Subordinate Judge and to restore that of the Munsif.

The next point which has been argued by the learned vakil for the respondent is that there was no prosecution in this case for which damages could be given. That depends on a construction of S. 58, Ben. Ten. Act. It is clear from the terms of that section that the plaintiff has committed an offence within the meaning of the Penal Code. This has been held to be so by the Calcutta High Court in *Emperor v. Mohant Ramdas* (6). Now if the omission to grant rent receipts in this case constitutes an offence within the criminal law and the defendants laid a complaint asking the punishment of the landlord for committing that offence, can it be said that there was no prosecution upon their part? It is argued that it would have been a prosecution if the complaint had been laid before a Magistrate but it is not a prosecution because the complaint was laid before the Collector, and that it was at best only a miscellaneous revenue proceeding and not a prosecution. I am unable to accept this argument. The designation of the officer before whom the complaint was laid cannot affect the question as to whether the proceeding can be called a prosecution in the one case and not a prosecution in the other. In my opinion there was a criminal prosecution before the Collector.

The third point which has been taken is that the defendants in the proceeding under S. 58 were not given an opportunity for adducing evidence. It appears that the application was dismissed for default and even if it was not dismissed for default, I cannot see how the fact

1. (1901) 25 Bom. 332.

2. (1901) 28 Cal 591.

3. (1910) 6 I C 675.

4. (1891) 2 Q B 718=61 L J Q B 151.

5. (1870) 39 L J Ex. 177=4 H L 521.

6. (1905) 9 C W N 816.

whether he did or did not call evidence affects the question whether the prosecution was malicious and without reasonable and probable cause. The fourth point is that as the Collector is empowered under S. 58, Ben. Ten. Act, to give compensation to the landlord the landlord cannot now in a civil suit claim compensation. In my opinion there is no substance in this argument. The suit is based on tort and the plaintiff is entitled, if he proves the necessary ingredients, to obtain the reliefs in respect of his cause of action. The omission of the Collector to give compensation in the proceeding before him does not affect the plaintiff's right in this proceeding. The result, therefore, will be that the appeal is decreed with costs and the decree of the Munsif restored.

V.S./R.K.

*Appeal allowed.***A. I. R. 1916 Patna 176 (1)**

CHAMIER, C. J. AND JWALA PRASAD, J.
Sadari Kunwari—Decree-holder—Appellant.

v.

Palknath Rai and others—Judgment-debtors—Respondents.

Civil M Appeal No. 497 of 1914,
Decided on 5th April 1916.

Occupancy—Non-transferable—It cannot be sold in execution of money decree.

An occupancy raiyat, whose holding is not transferable by custom, can object to the sale of a portion of the holding in execution of a simple money-decree against him: *A. I. R. 1915 Cal 242, Foll.* [P 176 C 2]

Dwarka Nath Mitra and Satyendra Nath Sinha—for Appellant.

Naresh Chandra Sinha—for Respondents.

Chamier, C. J.—The question for decision in this appeal is whether the holder of a money-decree against an occupancy tenant whose holding is not transferable by local custom, is entitled in execution of that decree to bring to sale a portion of the holding. It seems to be conceded that the decree-holder would not be entitled to bring to sale the whole of the occupancy holding, but it is contended that he is entitled to bring to sale a portion of the holding. It appears to me that the question is covered by the first proposition laid down by the Full Bench in the case of *Dayamoye v. Ananda Mohan Roy Choudhuri* (1). The first proposition was as follows: Transfer of the

1. A I R 1915 Cal 242=27 I C 61=42 Cal 172.

whole or a part (of an occupancy holding) is operative as against the raiyat, (a) where it is made voluntarily, (b) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside. It is evident that if an occupancy raiyat is entitled to have a sale of the whole or a part of his holding set aside, he also objects to the sale taking place. I am of opinion, therefore, that this case is covered by the first proposition laid down by the Full Bench and that this appeal should, therefore, be dismissed with costs.

Jwala Prasad, J.—I agree.

By the Court.—The order of the Court is that the appeal is dismissed with costs. Hearing-fee two gold mohurs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 176 (2)**

CHAMIER, C. J. AND SHARFUDDIN, J.

Emperor

v.

Suba Singh and others—Accused.

Criminal Ref. No. 2 of 1916, Decided on 1st November 1916, made by Sess. Judge, Patna.

Penal Code (1860), S. 143—Crowd of Hindus threatening to take away cows collected for sacrifice—Offence under S. 143 is committed.

Where a large crowd of Hindus appeared in a village and threatened to take away the cows of the Mahomedans which they had collected for sacrifice on the occasion of Bakr-id:

Held: that an offence under S. 143, had been committed. [P 177 C 1]

Deputy Government Advocate—for the Crown.

S. Sinha and Nirsu Narayan Sinha—for Accused.

Judgment.—Suba Singh and twelve others were committed to the Court of Sessions to be tried on charges framed under Ss. 399 and 144, I. P. C. The Jury unanimously acquitted all the accused of the charges under Ss. 399 and 144, I. P. C. The Sessions Judge in his charge to the Jury pointed out that though the evidence might not justify a conviction under S. 144, I. P. C., still the Jury might convict the accused of an offence under S. 143, I. P. C., that is, they might find that they were members of an unlawful assembly. The Jury however declined to convict the accused under S. 143 and the learned Sessions Judge, being of opinion that the verdict of the Jury as regards the offence under S. 143 was perverse, has referred the case to this Court with

the recommendation that the accused should be convicted under S. 143. The facts of the case are that in a village called Kanchanpur in the Patna District there are 25 to 30 houses of Mahomedans and a rather larger number of houses of Hindus. According to the evidence the relations between the Hindus and the Mahomedans were satisfactory up to 1915. It is said that the Mahomedans sacrificed cows at Bakr-id in their houses without interference on the part of the Hindus. However that may be, it is certain that till October 1915 there was no serious trouble between the Hindus and the Mahomedans regarding the sacrifice of cows at Bakr-id. The evidence shows that on 18th October 1915, that is two days before the Bakr-id, a large crowd of Hindus appeared in the village and threatened to take away the cows of the Mahomedans. Four of the latter made a report to the Police and the Sub-Inspector went to the village.

As it appeared to him that a breach of the peace was imminent, he telegraphed to the Sub-Divisional Magistrate and the District Magistrate and on the following day these two officers and also the Superintendent of Police went to the village. The Sub-Divisional Magistrate appears to have arrived first. Upon the evidence of the Magistrate and the Superintendent of Police there can be no room for doubt that the Hindu party constituted an unlawful assembly, their avowed intention, as expressed by one of their leaders, Suba Singh, who is one of the present accused, being to compel the Mahomedans to give up their cows; and when ordered to desist they adopted a threatening attitude even in the presence of the Police. There is little doubt that if the Magistrate and Police had not gone to the village there would have been a serious riot. It is unnecessary to labour this point for even the learned counsel for the accused admitted that technically the Hindus constituted an unlawful assembly, but he urged, firstly, that the Hindus acted under extreme provocation and, secondly, that the Jury were justified in acquitting the accused because at the instance of the Magistrate a compromise was arrived at between the Hindus and the Mahomedans, and the present case was started not so much with the object of securing the punishment of the Hindus as to establish the right of the Mahomedans to sacrifice cows in the village at the Bakr-

id. There is some evidence that a man named Chandoo Mian shortly before the occurrence in question appeared in the village and boasted that the Mahomedans would not only sacrifice cows at the Bakr-id but that they would hawk the flesh of the cows round the village. We are not prepared to find it proved that such a threat was actually expressed by Chandoo Mian, but it is certain that something occurred shortly before 18th October which disturbed the theretofore friendly relations between the Hindus and the Mahomedans.

Assuming, however, that some provocation was offered by the Mahomedans or one of them, the Hindus were not justified in acting as they did. We can only consider the question of provocation in the matter of sentence. The compromise was effected at the instance of the Magistrates and the police officers. It is unnecessary to discuss the question whether the Mahomedans were or were not free agents when they agreed to the compromise. Upon this point there is a conflict of testimony. It is sufficient to say that they yielded to the representations made by the Magistrates. But soon after the Bakr-id they realized that they had weakened their position and it appears, as the learned counsel for the accused has said, that this case was started for the purpose of establishing the right of the Mahomedans to sacrifice cows at Bakr-id. The complainant himself in his cross-examination admitted this. This also we may properly take into consideration in the matter of sentence. In our opinion the verdict of the Jury was perverse. The evidence proves beyond a shadow of doubt that the Hindus constituted an unlawful assembly. The Jury should have returned a verdict of guilty under S. 143, I. P. C. and left the Sessions Judge to deal with the question of sentence. They evidently took the law into their own hands, because they thought that under the circumstances the Hindus should not be convicted. We were invited by the learned counsel for the accused to hold that even if the other accused are guilty under S. 143, I. P. C., Suba Singh is not guilty because one of the witnesses says that Suba Singh took a prominent part in bringing about the compromise and that he entreated the Mahomedans with folded hands to give up their cows and sacrifice goats instead. It

appears to be the fact that after the Magistrates and the Superintendent of Police arrived in the village Suba Singh assisted them to bring about the compromise; but he was one of the leaders of the Hindu party, he does not live in Kanchanpur and appears to have thrust himself into a quarrel which did not concern him directly and done all in his powers to compel the Mahomedans to give up their cows. It appears to us that the guilt of Suba Singh is greater than that of the other accused. He is a man of affairs, was one of the leaders of the Hindus on that day and must have been largely responsible for the collection of so large a crowd at Kanchanpur. For this reason we set aside the verdict of the Jury and convict all thirteen accused under S. 143, I. P. C. Taking into consideration the circumstances mentioned above as also the fact that almost a year has elapsed since the occurrence in question, we have come to the conclusion that it is unnecessary to send any of the accused persons to jail. We sentence Suba Singh to pay a fine of Rs. 100 or in default to undergo rigorous imprisonment for six weeks. We sentence each of the other accused to pay a fine of Rs. 20 or in default to undergo rigorous imprisonment for three weeks. As it is quite clear to us that the Hindus assembled armed with lathis and grasas for the purpose of committing a breach of the peace, we direct that Suba Singh do execute a bond for keeping the peace for one year in the sum of Rs. 2,000 with two sureties in Rs. 1,000 each, to be approved by the District Magistrate. We direct that each of the other accused do execute a bond for keeping the peace for one year in the sum of Rs. 100 each with two sureties in Rs. 50 each, to be approved by the District Magistrate.

V.S./R.K.

Accused convicted.

A. I. R. 1916 Patna 178

SHARFUDDIN AND ROE, JJ.

Mt. Narainbati Kunwari and another
—Defendants—Appellants.

v.

Ramdhari Singh and others—Plaintiffs
—Respondents.

First Appeal No. 263 of 1913, Decided on 6th April 1916, against judgment and decree of Offg. Second Sub-Judge, Monghyr, D/- 29th April 1913.

(a) **Hindu Law—Maintenance—Daughter's daughter—Right of—No right in estate left by maternal grandfather.**

A daughter's daughter, in a Mitakshara Hindu family, has no legal claim for maintenance from the estate left by her maternal grandfather. [P 180 C 1]

(b) **Hindu Law — Alienation — Widow—Necessity—Daughter's marriage is necessity—Daughter has right of maintenance—Marriage of daughter's daughter though moral duty is not legal necessity.**

The marriage of a daughter is a religious act and a widow should charge her husband's estate with the costs of the marriage of the daughter and the daughter has also a right to be maintained by the estate. [P 180 C 1]

As, after marriage, the daughter enters into the family of her husband, her daughter has no claim to have her marriage performed out of her maternal grandfather's estate. The fact that she was always living with her maternal grandfather and was an orphan at date of her marriage casts a moral duty on the grandmother to have her properly married, but will not be a legal necessity of such a nature as to bind the estate. [P 180 C 1]

(c) **Hindu Law — Alienation — Widow—Mortgage by widow of her right does not necessarily mean her life-interest.**

A mortgage by a widow of her right and interest in her husband's estate does not indicate necessarily that she mortgaged only her life-interest. [P 179 C 2]

(d) **Hindu Law — Alienation — Widow—Necessity—Per Roe, J.—Moral obligation though pressed by public opinion does not justify alienation.**

Per Roe, J.—A widow's estate cannot be made liable for expenses incurred in discharging a moral obligation, though it was brought on the widow's family by reason of pressure of local Hindu opinion. When the moral obligation is brought about by the widow's voluntary act, all the consequences of that initial voluntary act must be considered in themselves voluntary obligations, and not legal obligations for which her husband's estate could be encumbered: 28 Cal 278, Ref: 34 Mad 288, Expl. [P 180 C 2]

P. R. Dass, Guru Sharan Prosad and N. C. Roy—for Appellants.

Pugh, Jayaswal and Kulwant Sahai—for Respondents.

Sharfuddin, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Monghyr, dated 29th April 1913. The suit was instituted on the basis of a mortgage-bond executed by a lady named Anupbati on 5th Bysack 1305, corresponding to 9th June 1898. Before I refer to the facts of the case it is necessary to mention here the relationship of the parties concerned. One Maharaj Singh was the ancestor of the defendants. He was married to one Narainbati, who is defendant 1 in the suit. He had two sons, namely, Jugah

Prasad and Kamla Prasad. Jugal Prasad is defendant 2 in the suit. Kamla Prasad had two wives, namely, Sunderbati and Anupbati. This Anupbati is the mortgagor of the bond in question. By Anupbati, Kamla Prasad had a daughter, named Surajbati. This daughter Surajbati was married to one Lalji Singh, son of Tota Singh, and Adyabati was the daughter of Surajbati and Lalji. Anupbati mortgaged some shares in two or three villages to one Ramdhari Singh, who is the plaintiff in the suit. By this mortgage the plaintiff advanced to Anupbati a sum of Rs. 1,500 and the mortgage bond recites that this loan was for the purpose of performing the marriage of Adyabati, her daughter's daughter. The plaintiff brought the suit for the realization of Rs. 7,000 odd, which includes the principal of Rs. 1,500 and interest and double interest.

The defendants contested the suit on the ground that Anupbati had mortgaged only her life-interest, and she being dead, the present suit is not maintainable against the present defendants. Another contention on behalf of the defendants was that the claim was barred by reason of limitation, and that in accordance with the Hindu law, the performance of the marriage of Adyabati cannot be treated as a charge on the estate of Kamla Prasad. The question of limitation arises in this way. The present suit has, no doubt, been instituted more than 12 years after the due date as mentioned in the bond. The due date mentioned in the bond is the month of Bysack 1307 fasli. The present suit was instituted on 18th May 1912, that is, more than 12 years after the date fixed for the repayment of the bond. But there is an endorsement on the back of the bond showing payment of a portion of the interest on 5th Asar 1314 fasli, a sum of Rs. 100 through Manohar, a cook. If the money was really paid as indicated by the endorsement, the limitation would begin to run, not from the due date as mentioned in the bond, but from the date of the endorsement. On behalf of the defendants-appellants it has been conceded that if this endorsement is a genuine one, the suit would be saved from limitation. The evidence with regard to the endorsement is, I find, in the deposition of Ramdhari Singh, plaintiff. He said, Manohar, the cook of Anupbati,

paid Rs. 100 on account of the interest of the bond to her. "I endorsed it on the bond." Practically there has been no cross-examination on the question of the payment of the Rs. 100.

The cross-examination on that point consists of about two or three lines, wherein it was suggested that Manohar was in service under the plaintiff. The plaintiff has denied it; no evidence has been put forward on behalf of the defendants to shew that Manohar was never in the employ of Anupbati, and that he was in service under the plaintiff. Mr. Das, appearing for the appellants, admitted that there was no evidence to contradict the statement of the plaintiff about the payment of Rs. 100, and it is conceded that that was a positive statement, which has not been rebutted by the defence, and the Court may take the payment of Rs. 100 as a fact. I am of opinion, therefore, that the payment of Rs. 100 on 5th Asar 1314 saved the claim from limitation. The next point urged is that Anupbati mortgaged only her life interest. Our attention has been drawn to certain expressions in the bond itself. At two places in the bond it is stated, that she mortgaged her shares in two or three of the villages. In that connexion she says, "my right and interest therein." She means whatever right she had, and this does not indicate necessarily that she had mortgaged only a life interest. But she further in the same document says:

"I, the declarant, or my heirs and successors shall not, until repayment of this bond with principal and interest, etc."

This really shows that what she intended to mortgage was a heritable estate and not a life estate. I think this point also fails. Then the question is as to whether in a Hindu family a daughter's daughter can have any claim for maintenance from the estate left by a maternal grandfather. A passage from Mayne was referred to in this connexion, which lays down a rule of law based on the pronouncement of the Judicial Committee. That author at p. 878, Edn. 3, says:

"It is admitted on all hands that if there be collaterals of the husband the widow cannot, of her own will, alienate the property, except for special purposes, a religious or charitable purpose or those which are supposed to conduce to the spiritual welfare of her husband. She has a larger power of disposition than that which she possesses for the purely worldly purposes, and to

support an alienation for the last she must show necessity."

Adhyabati's mother was married to one Lalji, who was the son of Tota Singh. There can be no doubt that in accordance with the Hindu law, the marriage of a daughter is a religious act, and the estate should be charged with the costs of marriage of the daughter, and the daughter has also the right to be maintained by the estate. But once she has married she enters into the family of her husband. Surajbati, therefore, after her marriage became a member of the family of Tota Singh, her father-in-law, and it was, therefore, the duty of Lalji and his father Tota Singh to see that Adyabati, the daughter of Lalji, was married. On behalf of the respondent it has been pointed out that Anupbati having only a daughter, namely, Surajbati, was anxious to keep the daughter in her own house even after her marriage, and that, therefore, Lalji, a poor cultivator's son, was selected as the husband of Surajbati, so that he may come and live in his mother-in-law's house as a ghurjamai and that since this marriage of Surajbati she always remained in her mother's house, and that, therefore, it was the duty of Anupbati to see that Surajbati's daughter was properly married. Tota Singh was a cultivator, and from the evidence it appears that he had about 20 bighas of cultivation; merely because Adyabati remained with her grandmother Anupbati is no ground, according to Hindu law, to charge the estate of Kamla Prasad with the cost of her marriage. It may be a moral duty to see that this girl was properly married, but I am not convinced that this can at all be considered as legal necessity of a nature that would bind the estate. That being my opinion, the appeal is decreed and the suit is dismissed with costs.

Roe, J.—I agree that the appeal should be decreed and the suit dismissed with costs. All that I wish to add to the judgment of my learned brother, is that throughout Mr. Pugh's argument an attempt has been made to make a widow's estate liable for expenses incurred in discharging a moral obligation brought upon the widow's family by reason of pressure of local Hindu opinion. This argument is based upon the decision in the case of *Vappuluri Tatayya v.*

Garinalla Ramakrishnamma (1). There is no doubt, as my learned brother has pointed out, that legally there was no obligation to maintain the child Adyabati. This is perfectly clear from the case of *Mokhada Dasse v. Nundo Lal Haldar* (2). The point Mr. Pugh takes is that there would have been grave dissatisfaction among the Hindu community if this child had not been married from the house of Anupbati with the ceremonial befitting the granddaughter of a zamindar. I hold that this moral obligation was brought upon the widow Anupbati by her own voluntary act in bringing the child Anupbati to her own house. That being a clearly voluntary act, all the consequences of that initial voluntary act must be considered in themselves voluntary obligations, and not legal obligations for which the estate of Kamla Prasad could be encumbered. It is to be noted, moreover, that this case of *Vappuluri Tatayya v. Garinalla Ramakrishnamma* (1) does not go nearly as far as Mr. Pugh contends. A widow can only alienate the deceased husband's estate for some purpose connected with his spiritual welfare. The marriage of a daughter's daughter is not a matter in which, outside Bengal, the maternal grandfather is concerned. So long as Tota Singh was alive and in a position to arrange for his son's daughter's marriage, that marriage was a matter for Tota Singh to arrange. It is in evidence that Tota Singh gave the girl away. Any assistance rendered by Anupbati was voluntary assistance. It conferred no spiritual benefit on her deceased husband. The alienation was a voluntary alienation, not an alienation for legal necessity.

V.S./R.K.

Appeal allowed.

1. (1911) 34 Mad 288=6 I O 240.
2. (1910) 28 Cal 278.

A. I. R. 1916 Patna 180

SHARFUDDIN AND CHAPMAN, JJ.
Brajamohan Pattasing—Appellant.
v.

Bamdeb Das—Respondent.

Appeal No. 577 of 1913, Decided on 8th December 1916, against appellate decree of Sub-Deputy Collector, Jajpur, D/- 18th December 1911.

Bengal Rent Act (1859), S. 13—Under-tenant—Meaning of, stated.

The word "under-tenant" in S. 13, Bengal Rent Act, is not used in its technical sense, i. e.,

in the sense of a tenant holding under another tenant, but in the sense of a tenant or tenure-holder holding direct under the proprietor.

[P 181 C 1]

J. N. Bose and Satish Chandra Bose—for Appellant.

Biswanath Singha—for Respondent.

Chapman, J.—This was a suit for enhancement of rent under Act 10 of 1859. The defendant was a sarbarakari tenure-holder. He took the plea that his rent was not enhanceable under S. 15, Act 10 of 1859. The suit was dismissed in the first Court. The plaintiff appealed and obtained an order from the District Judge directing that a fair and equitable rent should be fixed. The tenure-holder now appeals to this Court. The first ground taken by him is that inasmuch as he is a tenure-holder holding direct under the proprietor, he is not liable in a suit for enhancement of rent and that the word "under-tenant" in S. 13 Act 10, of 1859, is used in the technical sense familiar in English Statutes, that is, in the sense of a tenant holding under another tenant. We have referred to Statutes, such as Act 8 (B. C.) of 1865, and we find that this word under-tenure or under-tenant was not used by the legislature at that time in its technical sense, but in the sense of a tenure or tenure-holder holding direct under the proprietor. Nor is there anything in the wording in the rest of S. 13 to indicate that the word was not used in this sense in that section. It was then contended that the zamindar having succeeded at the settlement in securing the omission of this tenure, he is precluded from now suing for enhancement of rent. The argument, I understand, is this: that the zamindar was recorded at the last settlement as collecting rent direct from the raiyats. He was therefore assessed at a higher rate of revenue than he would have been, if there had been any intermediate tenant. Therefore it is now not open to him to apply for enhancement of rent as against this tenure-holder upon the ground that he has to pay revenue at a higher rate. We are unaware of any principle of law which would support such a contention. The result is that the appeal is dismissed with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 181

SHARFUDDIN AND ROE, JJ.

Behari Sahu—Appellant.

v.

Juthar Mall—Respondents.

Appeal No. 172 of 1916 Decided on 20th December 1916, from original order of Dist. Judge, Monghyr, D/- 29th April 1916, in Insolvency Case No. 22 of 1915.

(a) Provincial Insolvency Act (1907), Ss. 15 and 42 — Order annulling adjudication — Grounds for—S. 42 is subject to S. 15.

Section 42 is subject to the provisions of S. 15 and if the Court acts under S. 42 for reasons that would not have prevailed under S. 15 for refusing the adjudication, then the order annulling the adjudication is bad. [P 181 C 2]

(b) Provincial Insolvency Act (1907), S. 15 — Application under S. 15—Extent of property cannot be considered.

The extent of the petitioner's property is not to be considered when dealing with an application under S. 15, and an order of adjudication cannot be annulled on the ground that the petitioner did not make a true statement of his property. 7 I C 394, *Rel. on*, [P 181 C 2]

Kulwant Sahay and Shiveshwar Dayal—for Appellant.

Lakshmi Narayan Singh and Har-narayan Prasad—for Respondent.

Roe, J.—This is an appeal from an order of the District Judge of Monghyr annulling an adjudication under S. 42, Provincial Insolvency Act. The ground given for holding that the adjudication should be annulled was couched in the following words: "So he would not have been adjudicated an insolvent, had he made true statements of his property." It has been shown clearly throughout the proceedings that the debts due by the petitioner in insolvency were for Rs. 500, and the case of *Udia Chand Maity v. Ram Kumar Khara* (1) is sufficient authority for the proposition that the extent of the petitioner's property is not to be considered when dealing with an application under S. 15. Clearly S. 42, in laying down that a District Court may annul an adjudication if it thinks it should not have been made, is subject to the provisions of S. 15, and if the Court acts under S. 42 for reasons that would not have prevailed under S. 15 for refusing the adjudication, then an order annulling the adjudication for the same reasons must be bad. In our opinion the order in this case cannot be justified by the facts and must, therefore, be set aside. We would impress it upon the learned District Judge, however, that if he wishes to

punish the insolvent for acts of bad faith committed by him, it is open to him to do so under the provisions of S. 43, under which the petitioner in insolvency is liable to six months' imprisonment. The appeal is allowed. Having regard to the facts found by the learned District Judge with regard to the good faith of the appellant we make no order as to costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 182 (1)

CHAMIER, C. J. AND JWALA PRASAD, J.

Markandar Genda—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 8 of 1916, Decided on 28th April 1916, against order of Sub-Divl. Officer, Bargarh, D/- 31st March 1916.

(a) Criminal P. C. (5 of 1898), Ss. 123 and 393 — Imprisonment in default of security is not sentence of imprisonment within S. 393.

Imprisonment on account of failure to furnish security for good behaviour is not a sentence of imprisonment within the meaning of S. 397, Criminal P. C. [P 182 C 2]

(b) Criminal P. C. (5 of 1898), S. 123—Object is to control conduct—It can be attained if sentence for another offence is made to run concurrently.

The object of detaining men in prison under S. 123, Criminal P. C., is to control their conduct for a certain period, and this object is attained equally well if a subsequent sentence of imprisonment under S. 225-B, Penal Code, is made to run concurrently with imprisonment under the section. [P 182 C 2]

Judgment.—In this case two men were committed to prison in consequence of their failure to furnish security for good behaviour. On the way to prison they escaped. They were re-arrested and convicted under S. 225-B, I. P. C., and sentenced to three months' rigorous imprisonment apiece. The Magistrate who tried the case directed the sentences to take effect after the expiry of the imprisonment which they were suffering in consequence of their failure to furnish security. The question whether imprisonment under an order passed under S. 123, Criminal P. C., is a sentence of imprisonment within the meaning of S. 397, Criminal P. C., has been the subject of several rulings. The Bombay, Madras and Punjab Courts hold that imprisonment on account of failure to furnish security for good behaviour is not a sentence of imprisonment within the

meaning of S. 397, while the Allahabad High Court holds the contrary. We prefer the view taken by the Bombay, Madras and Punjab Courts, and we understand that it is in accordance with the practice hitherto prevailing in this province. We think that the sentence of imprisonment inflicted under S. 225-B should have been ordered to run concurrently with the imprisonment which the men were then undergoing. The object of detaining men in prison under S. 123, Criminal P. C., is to control their conduct for a certain period, and this object is attained equally well if the subsequent sentence of imprisonment is made to run concurrently with the other imprisonment. We, therefore, direct that the sentences of three months' rigorous imprisonment imposed upon Markandar Genda and Beda Genda under S. 225-B by the Sub-divisional officer shall run concurrently with the imprisonment which they are undergoing under S. 123, Criminal P. C.

V.S./R.K.

Order modified.

A. I. R. 1916 Patna 182 (2)

ROE AND JWALA PRASAD, JJ.

Rameshwar Singh Bahadur Darbhanga—Petitioner.

v.

Mahabir Singh—Defendant—Opposite Party.

Civil Revn. No. 160 of 1916, Decided on 14th December 1916, against order of Munsif, Sitamarhi, D/- 12th June 1916.

Bengal Tenancy Act (1885), S. 170 (3)—Deposit under S. 170 (3)—Unregistered transferee of entire holding cannot make.

An unregistered transferee of an entire holding is not entitled to make a deposit under S. 170, sub-S. (3), Ben. Ten. Act (8 of 1885). [P 182 C 2]

Purendra Narain Sinha and Murari Prasad—for Appellant.

Baidyanath Narain Sinha—for Opposite Party.

Judgment.—The case of *Rameshwar Singh v. Raghunandan Khawas* (1) sets at rest the question whether an unregistered transferee of an entire holding is entitled to make a deposit under S. 170, sub-S. (3), Ben. Ten. Act. We, therefore, make this Rule absolute and direct the Munsif to refuse the deposit made by the transferee of the holding in this case and proceed with the sale. We assess the costs of this application, which will be

paid to the petitioner by the opposite party, at one gold mohur.

V.S./R.K. *Rule made absolute.*

A. I. R. 1916 Patna 183

CHAMIER, C. J. AND JWALA PRASAD, J.

Jadhu Mahto—Plaintiff—Appellant.

v.

Kali Prasonno Bhattacharjee—Defendant—Respondent.

Second Appeal No. 340 of 1914, Decided on 28th March 1916, from decision of Addl. Dist. Judge, Manbhum D/- 26th March 1914.

Chota Nagpur Tenancy Act (6 of 1908), S. 47—Objection can be taken even after decree in execution.

An objection to the sale of a raiyati right in execution of a mortgage decree under S. 47, Chota Nagpur Tenancy Act, may be taken after the passing of the decree and it is the duty of the executing Court to determine the question; 40 Cal 534, Ref. [P 183 C 1, 2]

P. R. Das, A. Sen and Jatindra Mohan Chowdhry—for Appellant.

Abani Bhusan Mukherji and Sishir Kumar Mitra—for Respondent.

Judgment.—The respondent to this appeal obtained a decree for the sale of a tank and certain other property which had been mortgaged to him by the appellant. On the respondent putting in an application for the sale of the property in execution of the decree, the appellant objected that the sale was prohibited by S. 47, Chota Nagpur Tenancy Act 6 of 1908. The first Court allowed the objection, but on appeal the Additional Judge of Manbhum held that the sale of the property was not prohibited by the section referred to. It was contended before us that the objection to the sale had been taken too late and that if the appellant desired to raise this objection he should have done so before the decree was passed. In the case of *Lakshmi Bibi Kujrani v. Atal Behari Halder* (1) it was decided that an objection of this kind might be taken after the passing of the decree for sale on a mortgage. We are of the same opinion. S. 47, Chota Nagpur Tenancy Act, provides that no decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding, nor shall any such right be sold in execution of any decree or order. It appears to us that the second portion of this provision applies to the present case and that it was the duty of the Court

executing the decree to consider whether the sale of the property was forbidden by the section. As regards the tank, it is sufficient to say that there is no evidence whatever that it forms part of an agricultural holding. This appeal so far as it relates to the tank must be dismissed. The remainder of the land is held by the appellant under a mukarrari lease of Asarh 1248 Fasli granted by one Sree Gulap Singh, who describes himself as a jagirdar. The material portion of the lease is as follows:

"I grant you a mukarrari lease in respect of (the land is described) at an annual rental of Rs. 5-8-0 on receipt of a premium of Rs. 11. I cease to have any right to the said land from this date and you acquire the right thereto. You will continue to enjoy the land from generation to generation by payment of the said rent from year to year without any enhancement or reduction. If I or my heirs claim the land from you or your heirs, the claim will be null and void."

The area of the land is not given in the lease. One of the witnesses examined in this case says that the area is more than 100 bighas. The evidence on both sides shows that portions of the land have been sold by the "lessees," but the dates of the sales have not been proved. The decree-holder contends that the judgment-debtor is a tenure-holder while the judgment-debtor contends that he is a raiyat in respect of the land in question. In the Chota Nagpur Tenancy Act, "tenure-holder" means primarily a person who has acquired from the proprietor, or from another tenure-holder, a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it; and includes (a) the successors in interest of persons who have acquired such a right, and (b) the holders of tenures entered in any register prepared and confirmed under the Chota Nagpur Tenancy Act, 1869; but does not include a mundari khunt-khattidar.

"*Raiyat*" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have such a right, but does not include a mundari khunt khattidar.

Explanation.—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of gathering the produce of it or of grazing cattle on it. (2) A person shall not be

deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a mundari khunt-khat-tidar. (3) In determining whether a tenant is a tenure-holder or a raiyat, the Court shall have regard to: (a) local custom, and (b) the purpose for which the right of tenancy was originally acquired. It is therefore necessary to ascertain the purpose for which the right to hold the land was acquired. The purpose for which the lease was granted is not stated in the document and the Courts below do not seem to have devoted much attention to the question. The result is that the oral evidence on the subject is extremely vague. We direct that the record be returned to the lower appellate Court in order that a definite finding may be recorded as to the area of the land, the purpose for which the lease was granted and as to the dates and particulars of transfer of the land effected by the lessees. The Court should also ascertain whether the lessor was a zamindar or a tenure-holder. "Jagirdar" is not conclusive.

V.S./R.K.

*Issue remitted.***A. I. R. 1916 Patna 184**

MULLICK, J.

Lachmi Narain Marwari—Plaintiff—Appellant.

v.

Chairman of Ranchi Municipality—Defendant—Respondent.

Second Appeal No. 2527 of 1914, Decided on 18th April 1916, from decision of Judicial Commissioner, Chota Nagpur, D/- 19th July 1914.

(a) Evidence Act (1872), S. 106—Matters within special knowledge of party—Knowledge must be of something peculiar.

In order to lay the burden of proving a particular matter on a party on the ground that he has special knowledge thereof, it must be shown that the knowledge is in the nature of something peculiar: 5 W R 148, Dist. [P 185 C 1]

(b) Evidence Act (1872), S. 106—Burden of proof—No difference between corporations and individuals.

So far as the rule of burden of proof goes no difference can be made between corporations and individuals. [P 185 C 1]

Susil Madhav Mullick—for Appellant.

Muhammad Fakhruddin—for Respondent.

Judgment.—The plaintiff is a resident of the Ranchi Municipality; the defendants are the Municipal Commissioners of that Municipality and are represented in the present suit by their Vice-Chair-

man. It appears that in 1902 the plaintiff purchased from one Piary Lal some *don* lands, which I understand to be lands cultivated by or fit for cultivation of paddy. About 1905 the defendants planted some trees along the road to the south of the plaintiff's lands, one of which trees was alleged by the plaintiff to have encroached upon his land. The plaintiff thereupon objected and a sub-committee of the Municipality made an investigation into the matter, with the result that the objection was found to be groundless. Thereafter in 1908 the plaintiff put a masonry wall upon the land with the permission of the Municipal Commissioners, but he proceeded to fill up a part of the land lying between that wall and the road and was prosecuted by the defendants on the ground that he had thereby encroached upon Municipal land, with the result that he was convicted and fined. The present suit is brought for a declaration of title to and recovery of possession of 10 feet of land lying between the wall and what the plaintiff considers to be the boundary of the defendants' road. The Munsif who tried the suit found the plaintiff's case proved, but as the plaintiff was willing to give up 4 feet adjacent to the road upon its southern boundary he gave a decree for only 6 feet immediately north of the wall. On appeal the learned Judicial Commissioner found that the plaintiff was entitled to only 1½ feet from the wall, and that the remaining portion, namely 8½ feet, was the property of the Municipal Commissioners. Against this modified decree the plaintiff now prefers the present second appeal and asks for a decree in respect of the whole of the 6 feet which were decreed to him by the Munsif, that is to say, the appeal relates to 4½ feet between the southern boundary of the portion given up and the wall.

Now the first point taken before me is that the learned Judicial Commissioner has thrown the burden of proof wrongly upon the plaintiff in saying that it is for the plaintiff to prove his case as in an ordinary action for ejectment. This part of the case is divided into three sub-heads. The first sub-head is that under S. 106, Evidence Act, it was for the defendants to show that the land in suit was theirs and that by reason of the special knowledge which defendants possessed, the case is taken out of the ordinary rule which

throws the burden of proof upon the plaintiff; and reliance is placed upon the case of *Nubo Kishen Mookerjee v. Promothonath Ghose* (1). Now can it be said that there was any fact in connexion with the dispute which was specially within the knowledge of the defendants? Ordinarily every defendant who has a good title to land has special knowledge with regard to his title, but in order to apply S. 106 the knowledge must be in the nature of something peculiar, and so far as I see there was nothing in the knowledge of the defendant Municipality with regard to the land in suit, which was peculiar. It is said that a Corporation in this matter stands on a different footing to individuals but I am unable, so far as the rule of burden of proof goes, to make any difference between Corporations and individuals, and on principle I see no reason for making any such difference; but then it is said that there is evidence to show that the defendants made a survey of the land in suit in or about 1905 and that the facts disclosed by that survey were matters specially within the knowledge of the defendants. In my opinion that would not be sufficient to bring the defendants under the operation of S. 106. The case of *Nubo Kishen Mookerjee v. Promothonath Ghose* (1) was altogether a peculiar case, in which the defendant claimed certain land as his lakheraj against the zamindar, and the Court threw the onus upon him, because it was shown that for a long number of years preceding his claim he was in possession of the land as patnidar and was in a special situation in the peculiar facts of that case which would justify the throwing of the burden upon him. But that case is different to the present case and the principle of S. 106, which is always a difficult principle to apply, has no application here.

The second sub-head of this part of the learned vakil's contention is that at any rate S. 114, Evidence Act, applies and that it was the duty of the defendants to produce a certain survey map, and as they did not produce it, it must be presumed that they had no title to the land in suit. Now it is not suggested, and there is no evidence to show, that there is any general map showing all the lands of the Municipality. All that appears is that there was a map prepared for the purposes

of the dispute of 1905. That was an item of evidence in the possession of the defendants and it was open to the plaintiff to call for it. He does not appear to have done so, and he cannot now say that by reason of S. 114 the defendants must be presumed to have suppressed the map because they have no title. In my opinion no such presumption arises. The third sub-head under this branch is that the onus does not lie upon the plaintiff because this is a case which comes within the principle of *Lukhi Narain Jagadeb v. Jodu Nath Deo* (2), but that again was a very special case of a dispute between two rival zamindars about a large tract of land where the boundary ran between waste lands, which had not been subject to definite possession and in respect of which no satisfactory evidence was obtainable. Now the land in the present suit is a very small part in the heart of the Municipality, which, according to the evidence, was under cultivation of, or capable of cultivation of paddy. There is no analogy between the waste land involved in *Lukhi Narani's* case (2) and that of the present suit. It was, as the learned Judicial Commissioner observes, perfectly competent to the plaintiff to produce evidence both of his time and the time of his predecessor to show up to what extent definite acts of possession had been committed in respect of the land. The principle therefore which puts the plaintiff and the defendant in the position of counter claimants does not at all apply to the present case. This disposes of the question of the burden of proof. In my opinion the learned Judicial Commissioner, although he has not gone into the different sections applicable to the case, is right when he says that the burden of proof is upon the plaintiff.

The next branch of the learned vakil's argument is that there has been a wrong admission of evidence. It is suggested that the learned Judicial Commissioner has wrongly admitted into evidence the opinions of Babu Radha Govind and Rai Saroda Charan, former Vice Chairman of the Municipality, to the effect that the land belongs to the Municipality. Now if the Judicial Commissioner had proceeded upon the mere opinions of these two gentlemen, no doubt those opinions would have been admissions within the meaning of the Evidence Act and, being admissions

1. (1866) 5 W R 148.

2. (1894) 21 Cal 504=21 I A 59 (P C).

made by the defendants, would have been inadmissible in support of the case of the defendants. But on a careful perusal of the learned Judicial Commissioner's judgment, together with the actual depositions of these two gentlemen, it is clear that the learned Judicial Commissioner has proceeded not upon the mere opinions of these two gentlemen, but has adopted and accepted the inference drawn by these gentlemen from the observations made by them as to the condition of the land. That was a perfectly legitimate course for the learned Judicial Commissioner and I cannot see that he has proceeded upon the mere admissions of a party. The objection therefore under S. 21, Evidence Act, does not apply. From the evidence of these gentlemen taken with certain other facts the learned Judicial Commissioner draws the inference that the road side slope of the defendants' road extended to within $1\frac{1}{2}$ feet of the plaintiff's wall. That is a finding of fact which, not being vitiated by any error of law, is final. The judgment of the learned Judicial Commissioner may not be satisfactory from all points of view, but I cannot say that in arriving at his finding of fact he has been guilty of any error of law which would entitle me to interfere in second appeal.

V.S /R.K.

Appeal dismissed.

A. I. R. 1916 Patna 186

CHAPMAN AND ATKINSON, JJ.

Mandil Das—Appellant.

v.

Megh Narain Dubey and others—Respondents.

Second Appeal No. 316 of 1911, Decided on 29th March 1916, from decision of Sub-Judge, 2nd Court, Shahabad, D-/ 8th May 1911.

Hindu Law—Debt—Manager—Joint family—Bona fide inquiry of necessity by creditor—Effect—Debts bind other coparceners—Per Atkinson, J.—Bona fide inquiry is sufficient though no necessity may exist.

A lender of money when advancing money to a manager of a joint Hindu family, is bound to satisfy himself by due inquiry honestly made that the advance is required by the manager, as borrower, for a valid family necessity and for the benefit of the estate. The debt binds the other coparceners whether they be adults or minors. [P 187 C 2]

Per Atkinson, J.—If the lender acts honestly and makes due inquiry then, even though the necessity may not in fact exist, he has satisfied the onus imposed on him by law. [P 187 C 2]

Lachmi Narain Sinha—for Appellant.
Pugh, S. Sinha and Kulwant Sahai—for Respondents.

Chapman, J.—This appeal arises out of a suit upon a mortgage bond, dated 2nd April 1896, executed by one Ram Ratan Dubey. Ram Ratan died in August 1897. The mortgagee sought in the present suit for a mortgage decree against the other members of the Hindu joint family, namely, the brother of Ram Ratan, his widow and the sons of the brother. The learned Subordinate Judge has dismissed the suit upon the ground that the other members of the joint family could not be held in the circumstances of the case to be liable under the bond executed by Ram Ratan. There are certain other issues in the case, namely, whether defendant 6 is or is not the son of the brother of Ram Ratan; but as after hearing the appellant we are not satisfied that the learned Subordinate Judge is wrong on the main point it is not necessary for us to go into these other issues. The bond sued upon is for the amount of Rs. 905. Of this amount Rs. 166.8.0 was on account of previous loans and Rs. 738.2.0 was on account of cash advanced at the time of the execution of the bond. The interest was at the rate of Rs. 2 per cent. per month interest to be compound with yearly rests. The suit was brought in May 1909, when the 12 years' period of limitation after the due date was about to expire, so that at the exorbitant rate of interest the amount due had increased from Rs. 905 to Rs. 16,177.13.0. When it is desired to attach liability to the members of a joint family by reason of an act done by one of them without the consent of the others it is necessary to show that the act was the act of a prudent manager or that the inquiry into the prudence of the act was made. On the face of it the transaction was not prudent and the further we inquire into the details of the matter the more are we satisfied that there is no substantial ground for interfering with the decision of the first Court. The first transaction between Ram Ratan and the mortgagee was in June 1894, when he seems to have taken a loan of Rs. 79 for the payment of Government revenue and road-cess.

There is no recital in the bond to the effect that this Rs. 79 could not have been paid from the family funds, and the family mukhtear who it is said had made

a temporary advance of this sum, was not examined by the mortgagee. The next transaction was in November 1895, when a bond was executed by Ram Ratan in which it is recited that under the bond of June 1894, Rs. 156-13-6 was now due and a further sum of Rs. 43-2-6 was taken in cash for necessary and valid expenses. Here again there is no recital that the Rs. 43-2-6 was necessary for the purposes of the family or that those expenses, whatever they were could not be met from other family funds. We then come to the bond in suit dated 22nd April 1896. It is there recited that further money is required for household expenses, for necessary and valid expenses of litigation and there is great necessity for money. It is said that money had been previously borrowed for the karaj sradh of Ram Ratan's father. There is evidence that after the expiry of several years after this bond money was borrowed by members of the family with some frequency and to a considerable extent, but there is not a scintilla of evidence that at the time that this bond was executed the family was not in a flourishing condition. The mortgagee says that he inquired from Ram Ratan and was satisfied with what he said. No further inquiry appears to have been made except that a servant of the mortgagee states that he with another servant who is now dead went into the village and inquired whether the property which it was proposed to hypothecate was encumbered. Certain witnesses were called to suggest rather than prove by their evidence that certain moneys were actually borrowed previously for the purposes of the father's sradh and that certain moneys were spent in the purchase of bullocks. These witnesses are none of them independent and it is not possible to say that the learned Subordinate Judge was wrong in not giving any credit to what they said. If we are to grant a decree in this case the result would be that it would be sufficient in order to charge members of a joint family, for the managing member merely to recite that the money was required for certain specified purposes. He would be relieved from the duty of exercising prudence. The result would also be that a mortgagee would be relieved from the duty which has been laid upon him in many decisions of the Privy Council of making proper inquiry into the necessity

of the loan before he can charge members of a joint family who have not consented to the transaction. In all the circumstances of the case we are not satisfied that the learned Subordinate Judge fell into error in the view which he took. We therefore, dismiss the appeal with costs. The costs will be the costs on the principle given effect to by the first Court, viz., defendants 1-5 one set of costs; defendant 6 another, and defendants 17-19 according to the value of his incumbrance.

Atkinson J.—In my opinion a lender of money similarly situated as the plaintiff in this case is bound, when advancing money to a manager of a joint Hindu property to satisfy himself by due inquiry honestly made that the advance is required by the manager as borrower, for a valid family necessity and for the benefit of the estate. If he acts honestly and makes due inquiry, then even though the necessity may not in fact exist, he has satisfied the onus imposed upon him by law, if he has reason to believe the truth of the information given to him by reason of such inquiry. This rule of law applies to loans raised by a manager of a joint Hindu family whether the co-sharers be adults or minors. In this case I am satisfied that the plaintiff made no adequate or proper inquiry as to the existence of any legal necessity prior to making the loan or loans in question in this suit. Whether any necessity in fact existed at the time of this loan in 1896 has not been shown by any reliable evidence and, in my opinion, the plaintiff did not bona fide take any honest steps to discharge the onus cast upon him by law as to inquiring into the family necessity or necessities of the defendants. Further this claim in my opinion is grossly extravagant and extortionate and nothing could more strongly demonstrate the extortionate nature of the plaintiff's demand than the fact that he lies by for 12 years all but two days without seeking to enforce his security, although admittedly default had been made many years previously in payment of the principal and interest while interest with interest accumulates with compound interest, piling up a huge load of debt on the defendants. I entirely concur in the view of my learned colleague that this action should be dismissed with costs.

V.S./R.K. Appeal dismissed.

A. I. R. 1916 Patna 188

MULLICK AND ATKINSON, JJ.

Balvadrū Samant Singh — Plaintiff—Appellant.

v.

Bimbādhār Roy—Defendant—Respondent.

Second Appeal No. 1643 of 1915, Decided on the 22nd July 1916, from a decision of Dist. Judge, Cuttack, 6th April 1915.

(a) Custom—Primogeniture — One test is whether right of eldest son was challenged in Court and litigation ended in compromise under which younger sons obtained mere maintenance.

One of the tests in cases where the custom of primogeniture is set up is whether the right of the eldest son was challenged in the Courts and whether the litigation invariably ended in a compromise under which the younger sons obtained a mere grant by way of maintenance which was far less than what they would have been entitled to under the ordinary law. 36 Cal 590; (P C), 16 All. 221; Ref. [P 189 C 2]

(b) Evidence Act (1 of 1872) S. 115—Admission by A in compromise of B's right to enjoy certain property is not inducement to third persons to believe B's title to be good—Third persons cannot set up A's admission as estoppel against A.

An admission by A in a compromise deed of the right of B to enjoy certain property by way of maintenance does not amount to an inducement to third persons to believe that B has a good title to the land, so that in the event of A impugning the validity of the compromise, a transferee from B cannot set up the admission as estopping A from claiming the land. A I R 1914 P C 27, Ref. [P 189 C 1]

D. N. Mitter and Satish Chandra Bose—for—Appellant.

Baikuntha Nath Dutt—for Respondent.

Mullick, J.— Defendant 1 is the brother of the plaintiff's father and defendants 2, 3 and 4 are the sons of defendant 1. In 1901 defendant 1 brought a suit against the plaintiff's father for a declaration of title to and recovery of certain family property. In that suit a compromise was arranged between the parties, affecting not only the property covered by the suit, but all the other property belonging to the family and it was declared that the plaintiff's father was entitled as of right to all the properties, with the exception of certain properties granted to defendant 1 by way of maintenance in accordance with the custom of the family. We are concerned with 18 acres out of the property thus given to defendant 1. These 18 acres form part of an area of 64.69 acres of resumed

lakherajland belonging to Taluk Gobind Prosad. A decree was made in accordance with the compromise on 12th July 1906.

On 2nd July 1903 defendant 1 sold 2.50 acres out of the above 18 acres to defendant 5. In 1907 defendant 1 sued the plaintiff for recovery of possession of certain other land falling within these 18 acres; and the plaintiff then for the first time in that suit raised the plea that the compromise of 1902 was ineffective because it related to property outside the scope of the suit and was not registered. This plea succeeded and the suit was dismissed.

But in the survey of 1910 the plaintiff and defendant 1 were recorded in equal shares in respect of the resumed lakheraj lands; and plaintiff, accordingly, in the present suit asks the following reliefs: first, declaration of his title by primogeniture to the lands of schedule (ka), (the first schedule), comprising 64.69 acres; and secondly, for recovery of the lands of schedule (kha), (the second schedule), which are the 2.50 acres transferred by defendant 1 to defendant 5 by the sale of 2nd July 1903. The learned Subordinate Judge decreed the suit; but on appeal the learned District Judge dismissed it on three grounds: firstly, on the ground that the plaintiff's claim was barred by adverse possession; secondly, that the plaintiff was estopped as against defendant 5; and thirdly, that the custom of primogeniture had not been established.

With regard to adverse possession the learned vakil for the plaintiff appellant admits, that he cannot successfully challenge the learned Judge's finding; but on the other two points he urges that the learned District Judge has committed an error of law. First as to the question of estoppel. I am unable to appreciate the view of the learned District Judge which appears to be founded on a sale made by the plaintiff to defendant 5 on 24th August 1905, that is, subsequent to the sale made by defendant 1 to defendant 5. The learned vakil for the respondents admits that he cannot support the learned District Judge's argument; but he contends that the circumstances show that the plaintiff did intentionally induce defendant 5 to believe that he had a valid title to the property, and thereby induced him to purchase the property from defendant 1.

In my opinion there is nothing to support this contention. Defendant 5 was an arbitrator in the suit between the plaintiff and defendant 1, and merely because the deed of compromise contained admissions by the plaintiff of the right of defendant 1 to enjoy the 18 acres by way of maintenance, I am unable to see that the plaintiff can in any way be said to have intentionally induced defendant 5 to believe that he had a good title. Much less can it be said that the plaintiff did anything to cause defendant 5 to purchase from defendant 1. There is no finding that there was any such inducement; and upon the facts it would be impossible to hold that the case was covered by S. 115, Evidence Act. In my opinion the learned District Judge was clearly wrong in applying that section to this case. Nor do the principles of *Mahomed Musa v. Aghore Kumar Ganguli* (1) apply. In that case long possession was held to give title in spite of an unregistered compromise.

Here the finding is that the compromise was never wholly enforced, that defendant 1 got possession of only part of the property and that he remained in possession for only a part of the period that elapsed between 1902 and 1907. Nor again does the principle of inconsistent positions apply. It is open to the plaintiff to impugn the defendant's title on the ground that there was no legal transfer. The unregistered compromise may perhaps operate as an agreement to sell of which specific performance might be enforced, but that is not the ground on which defendant 5 resists the plaintiff's title. Finally, there is no finding that plaintiff held defendant 1 out as an ostensible owner and S. 41, T. P. Act, has no application. I find, therefore, that the suit is maintainable. There remains the question of primogeniture. The learned District Judge finds that the custom set up by the plaintiff was neither ancient nor certain. It is necessary, therefore, to examine the evidence upon which the plaintiff bases his case. We have a decree of 1854, which shows that a member of the family named Kamla sued Indrajit, who was then alleged to be the head of the family, for partition; but failing to establish his claim he compromised with Indrajit and took 7 acres old as his maintenance. Again in 1858 there was a similar suit in which the then

plaintiff failing to get partition compromised for 6 acres by way of maintenance. At that time the family property measured 86 acres, and, therefore, 7 acres and 6 acres would represent about one-twelfth and one-fifteenth of the whole. These proportions were very much less than the share which the plaintiff in these suits would have been entitled to, if the ordinary Hindu law had taken effect. Then we have the compromise of 1902, in which it was distinctly asserted that the 18 acres which were given to defendant 1 were given according to "the custom of obtaining maintenance which is prevalent in our family." This admission is evidence which strongly corroborates the plaintiff's claim. It may be said that the evidence so far as it goes, only establishes the plaintiff's right from 1854; but then there is a proceeding of 1839, which shows that in that year Indrajit was described as Choudhury and was recorded as in possession of the whole of the resumed lakhraj property. Taken with the evidence from 1854, this document of 1839 does tend to show that the custom of primogeniture was recognised in 1839 also.

Their Lordships of the Privy Council in *Rama Kanta Das v. Shamanand Das* (2) have laid down that one of the tests in cases where the custom of primogeniture is claimed, is whether the right of the eldest son was challenged in the Courts and whether the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. If the younger sons did so succeed in defeating the eldest son, it would be an indication that there was no custom. In the present case the converse proposition would seem to hold good. The right of the younger sons was disputed in the Courts, and they invariably failed to establish that they were entitled to a share by partition, and they then compromised their claim by obtaining a mere grant by way of maintenance. A similar proposition was laid down in the case of *Rama Nand v. Surgiani* (3) in which the Judges of the Allahabad High Court were of opinion that the kind of evidence which was sufficient to establish custom, was evidence

(1) A I R 1914 P C 27 = 23 I C 930 = 42 Cal 01 = 42 I A 1 (P C).

2. (1909) 36 Cal 590 = 11 C 754 = 36 I A 49 (P C.)

3. (1894) 16 All 221.

showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled to succeed. Having regard, therefore, to the above facts, which show that since 1839 the custom of primogeniture has been recognised in the plaintiff's family, I think the custom may be held to be ancient and reasonable and sufficiently certain to entitle the plaintiff to the reliefs claimed by him. The result, therefore, is, that the decree of the lower appellate Court will be set aside and the plaintiff's suit must succeed. His right by primogeniture to the suit lands will be declared, and he will be entitled to recover from defendant 5 the lands of Sch. (2). The appellant will be entitled to get his costs in all Courts.

Atkinson, J.—I concur.

V.S./R.K. *Appeal decreed.*

A. I. R. 1916 Patna 190

ATKINSON AND JWALA PRASAD, JJ.

Khudiram Mahto—Defendant—Appellant.

Chandi Charan Mahto and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 104 of 1914, Decided on 9th June 1916, from decision of Sub-Judge, Manbhum, D/- 13th January 1914.

(a) Civil P. C. (5 of 1908), Sch. 2, Para. 10—Reference to arbitration—Signing of award before filing in Court necessary—Award signed after submission to Court by absent arbitrators—Decree is illegal and invalid.

Under S. 10 Sch. 2, Civil P. C., it is incumbent upon all the arbitrators to sign the award before it is filed in Court, and a Court has no power to allow any of them to sign it after it is duly submitted. [P 193 C 2]

A decree passed in accordance with an award which was signed by some of the arbitrators after its submission to Court is illegal and invalid: 33 Cal. 498 and 19 W. R. 47, Ref. [P 193 C 2]

(b) Civil P. C. (5 of 1908), Sch. 2, para 16—Objections to validity of award overruled—Decree not appealable unless it is in excess of or not in accordance with award.

Though it is open to the Court which made the reference to set aside an invalid award yet, when the objections to its validity have been overruled by it and a decree has been passed in terms of the award, an appeal does not lie from such a decree under S. 16 Sch. 2, Civil P. C., except where the decree is in excess of or not in accordance with the award: 29 Cal. 167 (P C), Foll.; 33 Cal. 893; 32 Mad. 510; A. I. R. 1914 All. 446; 5 I. C. 98, Ref. [P 194 C 1]

(c) Civil P. C. (5 of 1908), Sch. 2, Para. 15—Proviso providing parties to object to award on any account is ultra vires.

Per Atkinson, J.—A provision in the petition

of compromise providing that any of the parties might object to the award on any account is ultra vires and contrary to the procedure applicable to arbitration proceedings arising in a pending suit, as laid down by Sch. 2, Civil P. C. and more especially by Cl. 15 thereof.

[P 192 C 2]

S. M. Mullick—for Appellant.

Naresh Chandra Sinha—for Respondents.

Atkinson J.—This suit was brought for the partition of the several mauzas set forth in the schedule to the plaint, and for separate possession on allotment of the property when partitioned. The suit was instituted on 27th October 1911. During the course of its proceeding a compromise petition was agreed upon between all the parties in the action with the sanction of the Court, providing that the partition of the properties mentioned in the plaint should be referred to arbitration. The petition of compromise is dated 23rd August 1912, and the only material paragraphs in the petition to which it is necessary to refer, are paras. 6 and 7. Para. 6 eo nomine appoints five arbitrators to make a partition. It is unnecessary to name more than two of these arbitrators and the two to be named are Abinash Chandra Ojha and Hari Mahto, and this clause also provides that, as between the parties to the suit, the partition to be made by the arbitrators was to be conclusive. Para. 7 merely embodies a declaration that the parties were to fully abide by the division and partition to be made by the arbitrators in pursuance of para. 6, with the additional provision that if any of the parties objected to the division on any account then, in that event, the partition should be effected through the Court at the cost of the individual or individuals who might object to the partition made and effected by the arbitrators. Only three of the five arbitrators met to consider and inquire as to the proper partition which it would be fair and right to make as between the parties to the suit.

The two arbitrators whom I have named and mentioned did not take any part in the arbitration, but the remaining three arbitrators having inquired and satisfied themselves made their award, declaring the nature of the partition which they had agreed upon. Hari Mahto, although he did not take part in the proceedings of the arbitration leading to the completion of the award, signed and

executed the award before it was filed in Court as one of the arbitrators, after it had been prepared and drawn up by his three colleagues who acted. Abinash Chandra Ojha, on the other hand, neither acted as an arbitrator in the inquiry, nor did he sign and execute the award prepared by his colleagues before the same was filed on 6th September 1913. The award, as stated, was filed in Court on 6th September 1913, and on 18th September 1913 defendants 6 and 10 objected to the award on the ground set forth in their respective petitions dated 8th September 1913; and, shortly stated, their objection to the award was twofold: one, that the award was not the joint adjudication of all five arbitrators who had been appointed to arbitrate, but was only the award of three, that two had not acted, that one had acted, signed and executed the award without having taken part in the arbitration inquiry, and on the further ground that Abinash Chandra Ojha had neither acted nor signed and executed the award prior to its being filed in Court, and that, secondly, in point of law the award was a nullity, and in no sense could it be considered a legal and valid award of the matters referred to the arbitration of the persons specifically named by the compromise petition.

On 12th January 1914 the matters arising on the petition of objection of defendants 6 and 10 came before the learned Subordinate Judge for his consideration and adjudication, and the learned Judge held that the objection of the defendants was barred by limitation of time, the same not having been made within 10 days from the date of the filing of the award and he apparently regarded the action of Abinash Chandra Ojha, in not having acted in the arbitration proceedings and not having signed the award, as a mere informality, because on 22nd

November 1913, this matter having been brought to his notice, he there and then in his own presence in open Court had the award, which was filed on 6th September, signed and executed by Abinash Chandra Ojha. So that, when the case arising on the objections of defendants 6 and 10 came before him, the award was signed by all the arbitrators, and the Judge, without considering the legal effect of how the award was procured, held that the award was regular upon its face and the plaintiff's right to challenge or set

aside the award was barred by limitation. He accordingly pronounced a decree in the terms of the award. We think that the award, which was brought into being as a result of the adjudication of only three persons instead of five, coupled with the fact that the award before it was filed was only signed by four instead of five, made the award itself void and without legal effect. But this matter is not really one which we have to consider with any great detail in this case.

The main question for consideration is, whether an appeal lies under para. 16, Sch. 2, Civil P. C., from the adjudication of the Subordinate Judge, declining to set aside the award on the objection of defendants 10 and 6 and the decree made and pronounced by him as the result of such rule. Para. 15, Sch. 2, Civil P. C., provides that no award shall be set aside, arising in any pending matter or suit, except on one of the three grounds set forth in Cls. (a), (b) and (c); and clearly it would have been open to the learned Judge, had he so thought fit, under Cl. (c) to have set aside this award on the ground of its invalidity. Prior to the year 1901 it was well recognised and established in all Courts in India, that a decree pronounced and passed in respect of an award which was void or illegal, was subject to a right of appeal under the old S. 522, Civil P. C., 1882, which is in terms identical with para. 16, Sch. 2, of the existing Code of 1908, because the interpretation which was given to the old section was, that the right of appeal was only taken away in cases where there had been a decree pronounced on a valid and legal award and that, if the award was void and illegal, then in fact there was no award and there was nothing upon which the provisions of the section could legally operate. However in 1901 their Lordships of the Privy Council had to consider the terms and provisions of the old S. 522 of the then Civil P. C. In the case of *Ghulam Khan v. Muhammad Hassan* (1) their Lordships of the Privy Council laid down in distinct and definite terms what they believed to be the true interpretation to be put upon the arbitration section set out in Sch. 2 of the Code, and more especially with regard to the interpretation they put upon S. 522. Lord Macnaghten there laid it down clearly and distinctly that to hold that an appeal lay from a de-

1. (1902) 29 Cal 167=29 I A 51 (P C).

decree pronounced on foot of an award in an arbitration matter from the Court having seisin of the arbitration proceedings, would be doing violence to the plain language and obvious intention of the Code, except in so far as the decree might be in excess of or not in accordance with the provisions of the award. The actual wording of S. 16, Cl. 2, Sch. 2, Civil P. C. is as follows:

"Upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as that decree is in excess of, or not in accordance with the award."

Thus, whether the award be valid or invalid, no appeal lies from the decision of the Judge of first instance as to the validity or invalidity of the award, except in cases where a decree pronounced in pursuance of the award is in excess or not in accordance with the provisions of the award itself. Up till that time the Courts in India had acted on a totally different basis. After the decision of the Privy Council in the case I have referred to, all the Courts in India, Calcutta, Madras, Bombay, Allahabad, and Punjab, loyally and universally followed and gave effect to the law as laid down by the Privy Council, thereby going back on the many previous decisions in which a contrary rule or principle had been laid down. In the year 1906 in the case of *Chairman of the Purnea Municipality v. Siva Sankar Ram* (2) Sir Francis Maclean, C. J., laid down what he conceived to be the true legal meaning of the decision of the Privy Council; and he says at p. 992 of *I. L. R. 33 Cal.* of the report:

"The Judicial Committee there held that no appeal lay where a decree had been passed under S. 522, Civil P. C., in accordance with the award, which is not the case before us. No doubt, before that decision of the Judicial Committee, there were a series of cases in most, if not in all the High Courts in India, which held in effect that, where a decree was passed upon an award, which is not valid or legal, an appeal would lie. I need not refer to these cases, because I think it must be taken that those cases were practically overruled by the decision of the Judicial Committee, to which I have referred."

Uniformly since then all the Courts in India have followed the principles enunciated by Sir Francis Maclean, C. J., in the case I have referred to. *Kanakhu Nagalinga Naick v. Nagalinga Naick* (3), *Lutawan Kubar v. Lachiya* (4), *Rai Charan Pukait v. Amrita Lal* (5) all

2. (1906) 33 Cal 899.

3. (1909) 32 Mad 510=4 I C 871.

4. A I R 1914 All 446=21 I C 989=36 I C 69.

5. (1910) 5 I C 98.

point to the same conclusion, and therefore, I think that we are inevitably bound to follow the course of practice established by a decision so universally recognised as now being the existing law of India. I desire only to mention the case of *Ramesh Chandra Dhar v. Karunamoyi Dutt* (6), a case identical with the present one before us, but judgment in which was delivered two days before the decision of Maclean, C. J., to which I have referred and, therefore, I think that the latter case, although in point, is not an authority which can bind us, having regard to modern and more recent decisions. Personally I doubt if the decision of the Privy Council in the case reported as *Ghulam Khan v. Muhammad Hassan* (1) was intended to have so far-reaching a meaning as has been ascribed to it, or that it could be considered as applying to a case where the award is ab initio void.

Thus it follows that there is no appeal from the decree and decision of the Subordinate Judge in this matter, and that his view as to the validity of the arbitration award established by his order of 13th January 1914 cannot be impeached on the appeal before us, and that, therefore, the decree of the Subordinate Judge pronouncing judgment in the terms of the award must stand. The provision in Cl. 7 of the compromise petition, providing that any of the parties might object to the award on any account, is, in my opinion, ultra vires and contrary to the procedure applicable to arbitration proceedings arising in a pending suit, as laid down by Sch. 2, Civil P. C., and more especially by Cl. 15 thereof. However, this point is immaterial as the decision of the Subordinate Judge is final and conclusive.

This appeal must be dismissed.

Jwala Prasad, J.—The suit out of which this appeal arises was instituted on 27th October 1911 for partition of certain mauzas set forth in the plaint. On 23rd August 1912 the parties filed a petition of compromise agreeing to appoint five persons as arbitrators to make partition and prepare chittahs according to the respective shares of the parties. On 11th September 1911 the Court passed a preliminary decree for partition and referred the matter to the arbitrators named in para. 6 of the petition to effect partition. By para. 7

6. (1906) 33 Cal 498.

of the petition the parties agreed to fully abide by the award of the arbitrators. On 6th September 1913 the award with the partition papers was filed in Court with the signatures of only four of the arbitrators. The fifth arbitrator, Abinash Chandra Ojha, had not signed the award. On 18th September 1913, defendants 6 to 10, who are appellants here, filed objections against the award, impugning its validity on, amongst others, the following grounds:

That the award was not prepared by all the five arbitrators appointed to make the award. Two of the arbitrators were not present at the time of making the award, one of whom only signed after the award was prepared, and the other arbitrator, Abinash Chandra Ojha, had not signed it even when the award was filed in Court. On 22nd November 1913, the date fixed for the hearing of the objections, the fifth arbitrator, Abinash Chandra Ojha, who happened to be present in Court signed the award under the orders of the Court. The objections of the appellants as to the validity of the award were overruled by the learned Subordinate Judge for the reasons given in his judgment dated 13th January 1914. After disposing of the above objections a decree was made by the first Court on the basis of the award. Defendants 6 to 10 have come up in appeal to this Court and seek to set aside decree of the Subordinate Judge.

The respondent disputes the competency of this appeal and contends that the decree of the Subordinate Judge is final and the appeal to this Court is barred by Cl. (2), R. 16, Sch. 2 of the Code. The appellants on the other hand contend that the clause does not apply to this appeal, inasmuch as R. 16 presupposes a valid award, whereas in the present case the award was invalid as not having been made by all the arbitrators appointed and upon such an award the Court could not pronounce any judgment or base its decrees. In *Ramesh Chandra Dhar v. Karunamoyi Dutt* (6), where the award was filed in Court without the signature of one of the three arbitrators, who however subsequently came in Court and signed it, and in *Jungle Ram v. Ram Heet Sahoy* (7), where the award was not signed by all the arbitrators appointed and there was no authority in the peti-

tion of submission for the majority to make it, the awards were held to be invalid.

Under R. 10, Sch. 2, it was incumbent upon all the arbitrators to sign the award before its being filed in Court, and as soon as the award was filed in Court the powers of the arbitrators came to an end, they became *functus officio*, and it was not open to any of the arbitrators to come in afterwards and sign the award, nor had the Court any power to allow him to do so. There is no provision in Sch. 2 of the Code, nor in the terms of the petition of submission to arbitration in the case, nor in the order of the Court referring the matter to arbitration, authorizing the majority of the arbitrators to make the award. The respondent relies on the authority of the Privy Council ruling reported as *Ghulam Khan v. Muhammad Hassain* (1). The case in the Privy Council, unlike here, was that all the arbitrators had signed the award when it was filed in Court, but the objection as to the validity of the award was on the ground that the arbitrators had wrongly decided the question of jurisdiction of the civil Court involved in that case. Their Lordships held that as the whole case, including the issue as to jurisdiction was referred to them, the arbitrators were both Judges of law and fact, for an error in law did not vitiate the award. Their Lordships however laid down generally that no appeal lies from a decree made under S. 522, Civil P. C., of 1882, corresponding to R. 16, Sch. 2, of the present Code, on the basis of an award except in so far as it is in excess of, or not in accordance with, the award and observed that to do otherwise would be doing violence to the plain language of the section.

The broad proposition laid down by Lord Macnaghten in the Privy Council, that no appeal lies from a decree based on an arbitration award, except in so far as the decree is in excess of, or not in accordance with, the award (in exact terms of Cl. 2, R. 16), has the effect of overruling all the decisions of the Courts in India to the contrary and has since been followed and acted upon by almost all the Courts. Since the Privy Council ruling the power of the original Court has been extended to set aside an award on the ground of its being invalid, by adding the words "or being otherwise invalid" to Cl. (c), R. 15 of the Schedule. No doubt when the

7. (1873) 19 W R 47.

parties take the matter in dispute between them out of the hands of the Court and agree that it should be decided by Judges or arbitrators of their own choice, they intend to put an end to litigation and the policy of the law is to give finality to the decision of the arbitrators, *finis rei attendus est*. The Court that refers is bound to give effect to the award and in order to do so is vested with the necessary powers (vide Rr. 12 to 15) by the rules in Sch. 2 to determine questions that arise after the finding of the award in Court. After determination of those questions the Court is required to pronounce judgment according to the award under R. 16 of the Schedule, Cl. (2) of which runs as follows:

"Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award."

The objection as to the validity of the award was taken by the appellants in the first Court which however held that the objection was a formal one as the fifth arbitrator Abinash Chandra Ojha, who had not signed the award when it was filed, did actually do so afterwards in Court, and thus the award ultimately came to be signed by all the arbitrators, and was therefore a valid award. The Court further held that the objections as to the validity of the award were out of time. The Court rightly or wrongly has held that the award was valid. Under Cl. 1 (c), R. 15 of the Schedule as it now stands, the Court had jurisdiction to determine objections as to the validity of the award. The appeal in this case is solely on the ground that the decree is based upon an invalid award, and not that it is in excess of, or not in accordance with, the award. In view of the general proposition laid down by the Privy Council and its universal observance, this Court cannot but hold that the appeal is incompetent however the facts of this case may be differentiated from those in the Privy Council case. The appeal is therefore dismissed, but without costs in the circumstances of the case.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 194

MULLICK AND KINGSFORD, JJ.

Ambica Prasad Singh and others
—Plaintiffs—Appellants.

v.

Baldeo Lal and another—Defendants
—Respondants.

Second Appeal No. 810 of 1915, Decided on 18th May 1916, from a decision of Dist. Judge, Gaya, D/- 18th March 1915.

(a) Evidence Act (1 of 1872), S. 102—Suit by landlord—Defendant pleading transfer by tenant—Defendant must prove existence of tenancy and validity of transfer—Landlord and tenant—Ejectment.

When a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the latter to prove, first of all, the tenancy, and secondly, the validity of the transfer: 12 W. R. 495 and 15 W. R. 274, *Diss. From*. [P 195 C 2]

(b) Landlord and tenant—Home farm land—Tenancy—Non-transferability of is presumed—Burden to show contrary is on tenant.—It is otherwise where pakka buildings are erected or landlord stands by allowing large expenditure by tenant.

The presumption in the case of tenancies of homestead lands created before the Transfer of Property Act, 1882, in the absence of evidence to the contrary, is that they were non-transferable the onus of proof being on the tenant. The only exception to this is when there has been an erection of pakka buildings or a standing by on the part of the landlord while the tenant spends a large sum upon the land. Mere long continued possession cannot give rise to a presumption of transferability: 32 Cal 1023, and 25 Cal 896 (*F. B.*), *Ref.* [P 195 C 2]

Gangadhar Das and Sivanandan Ray
—for Appellants.

Ganssh Dutta Singh—for Respondents.

Mullick, J.—Defendant 2 holds a jagir tenure in Mauza Mawahar of which the plaintiff is the admitted proprietor. Outside that jagir is a piece of homestead land upon which there stands a hut consisting of mud walls and thatched roof. The plaintiff alleges that Kuber Misser, one of the successors of the original tenant, made a deed of gift of this land to defendant 2, that defendant 2, sold it to defendant 1 and that as neither the original tenant nor defendant 2, had any transferable interest in the land, defendant 1 is liable to be ejected. It is admitted before us that no rent has ever been paid for the land; that the original lessee was admitted into the land by plaintiff's predecessor about 50 years ago, i. e., before the Transfer of Property Act came into operation and that the tenancy is heritable. The plaintiff's case is that the original lessee was a tenant-at-will.

Defendant 1, in his written statement made an allegation that Saligram Misser, one of the successors of the original tenant, became absolute owner of the house and sold it to him. He denies the title of Kuber Misser, but asserts that even if Kuber Misser transferred the house to Saligram by a deed of gift, as alleged by plaintiff, he had a perfect right to do so as the tenancy is transferable. The learned Munsif found that Saligram had no transferable interest in the land, and decreed the suit.

In appeal the learned District Judge adopted a line of reasoning which does not commend itself to us. He found that Kuber Misser transferred his jagir tenure to Saligram by a deed of gift, dated 13th September 1911, together with the homestead land in suit. He was of opinion that on the analogy of S. 182, Ben. Ten. Act, which empowers a raiyat, who holds homestead land in a village otherwise than as a part of his holding, to acquire occupancy rights in that homestead land, the occupant of the homestead now in suit is entitled to hold it on the same terms as the jagir tenure. He accordingly held that in the absence of evidence to the contrary, the onus in respect of which was upon the plaintiff, Kuber Misser's interest was transferable. It is admitted on both sides that this argument is fallacious. Before us the case of adverse possession, weakly suggested in the written statement, has been abandoned and the parties have narrowed the dispute to the issue whether the original lessee had a transferable interest. According to plaintiff Kuber Misser was the last heir of the original grantee and made a deed of gift in favour of Saligram. According to defendant 1, Kuber Misser had no title at all and Saligram was the last heir. The learned Munsif has not considered it necessary to determine whether Kuber or Saligram was the last representative, but he has decreed the suit on the ground that the original grantee had not a transferable interest. In my opinion this decision is right.

The cases of *Banee Madhub Banerjee v. Joy Kishen Mookerjee* (1), and *Doorga Pershad Misser v. Brindabun Sookul* (2), are in favour of the defendant and would support the argument that, before the Transfer of Property Act, a lease of a plot

of land given for residential purposes was, by the custom of the country, transferable, but the correctness of this proposition, which is based on a dictum of Sir Barnes Peacock, is now doubted and the effect of the recent decisions is, that when a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the latter to prove, first of all, the tenancy and, secondly, the validity of the transfer. With regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of these decisions has been to establish that in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies were non-transferable. The decision of Maclean, C. J., in *Madhu Sudan Sen v. Kamini Kanta Sen* (3), is clear authority upon this point. The only exception made to the above rule is when there has been an erection of pakka buildings or a standing by on the part of the landlord while the tenant spends a large sum upon the land [See the reference and judgment of Rampini, J., in *Nabu Mondul v. Cholim Mallik* (4), where the previous authorities are fully reviewed.] In any event, mere long continued possession cannot give rise to a presumption of transferability. In the suit before me, although possession and heritability for more than 50 years has been proved, there is no evidence of custom or of the building of permanent buildings or a standing by to take the case out of the operation of the ordinary rule. I think, therefore, that the decree of the learned Munsif is right and that the original tenant had no transferable interest. Defendant 1 is, therefore, a trespasser and is liable to be ejected. I would decree the appeal and restore the judgment of the Munsif with costs throughout.

Kingsford, J.—I agree.

V.S./R.K.

Appeal decreed.

3. (1905) 32 Cal 1023.

4. (1898) 25 Cal 696 (F. B.).

A. I. R. 1916 Patna 195

MULLICK AND ATKINSON, JJ.

Chamru Satpasti and others—Defendants—Appellants.

v.

Dirba Babu—Plaintiff—Respondent.

Second Appeal No. 3209 of 1914, Decided on 24th July 1916.

1. (1869) 12 W. R. 495.

2. (1871) 15 W. R. 274.

(a) **C. P. Tenancy Act (1898)—Suit based on trespass—Act does not apply and Civil Court has jurisdiction.**

The provisions of the Central Provinces Tenancy Act do not apply to a suit based on trespass and a Civil Court has jurisdiction to entertain such a suit: 35 Cal 470; 2 L C J 359, and 16 C. P. L. R. 135, Ref. [P 196 C 2]

(b) **C. P. Tenancy Act (1898), Ss. 46 and 47—Foreclosure of tenancy by mortgagee—Whether sections apply—Quaere.**

Quaere.—Whether the provisions of Ss. 46 and 47, Central Provinces Tenancy Act, would apply to the case of a mortgage who forecloses and goes into possession of a tenancy within the provisions and terms of the Act under a decree in a foreclosure suit. [P 197 C 1]

J. N. Bose—for Appellants.

M. S. Dass—for Respondent.

Atkinson, J.—The facts of this case must be fully stated and understood before one can apply the provisions of the Central Provinces Tenancy Act of 1898. The plaintiff, who is a minor, is the landlord or lambardar of Mouza Chichinda, having succeeded thereto in 1902 on the death of his father Niranjan Babu. Magu Bhoi, Bama Bagar, and Niladri Biswal were occupancy tenants holding raiyati holdings in Mouza Chichinda from the plaintiff as their landlord. These tenants have been dispossessed of their holdings, and the defendants are in possession of the lands formerly in the occupation of the plaintiff's tenants. It is not proved in this case how the defendants acquired their right to possession in the lands, the subject-matter of this suit. The plaintiff has no knowledge of their title beyond mere hearsay, and he brings this action against the defendants as trespassers, alleging that they have no claim, right, title or interest to the lands in dispute and are not in fact his tenants but trespassers. This suit was instituted on the 13th September 1912, and the plaint was filed on the 16th September 1912. The defendants on the 19th November applied by petition for time to file their written statement; time for so doing was granted by the Subordinate Judge, but the defendants failed to file their written statements within the time allowed, and applied again for a further extension of time; but the prayer of their second petition was refused, and the case was fixed for a definite day for hearing, when the defendants did not appear to resist the plaintiff's claim in this action. Accordingly the Subordinate Judge called upon the plaintiff to prove his case and this he did, by calling one witness who alleged

on oath that the plaintiff was the proprietor of the property in suit, and that the defendants were holding the disputed land without any right. Upon this evidence the learned Subordinate Judge *ex parte* gave a decree for possession of the disputed land in favour of the plaintiff with costs and interest at 6 per cent.

No proof was given of how the defendants derived their title and the simple allegation made against them was that they were trespassers. In para 4 of the plaint it is suggested that the defendants allege that they got possession of the lands in suit by foreclosing some mortgages in their favour by the aforesaid tenants; but the plaint further alleges that the plaintiff has no knowledge of any such mortgage, and that if it existed the same is void. The only proof that is given is to show that the defendants are merely trespassers and not transferees or assignees of the original tenants. It appears to us that the provisions of the Central Provinces Tenancy Act (11 of 1898) do not apply to the facts of the present case, and that consequently the Civil Court is not deprived of jurisdiction to hear and dispose of the present action under the provisions of the Statute referred to. The claim is based on trespass, and the defendants are proved to be in occupation of the lands without colour of title and are thus trespassers. If it had been shown by the defendants by evidence that they had succeeded under some mortgage made to them by the previous tenants, and that they were in occupation of the lands under such mortgage or transfer, then perhaps the provisions of the Central Provinces Tenancy Act might be deemed to apply, such mortgage being an assignment or dealing with the tenants' rights in their holding in contravention of the provisions of S. 46, of the Statute. If such were the facts it would appear to us that then the case would be one properly entertainable by the Revenue Officer under the provisions of S. 47, and that, as he would have jurisdiction to put either the heir or heirs of the original tenants or the landlord in possession of the holding transferred by the tenants in contravention of the provisions of S. 46, the jurisdiction of the Civil Court would be ousted under the provisions of S. 95. The case of *Icharan Singh v. Nilmoney Balidar* (1) recognises this to be settled

1. (1908) 35 Cal 470.

law, and it is stated there by the Judges at page 473:

"That it is an elementary principle when statutory rights and liabilities are being created and jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court,"

and the Judges rely on the case of *Bhandi Singh v. Ramadhin Rai* (2) and on the case of *Dayaram Petel Lodhi v. Shaligram Lodhi* (3). However, the facts of the present case in no way resemble the foregoing supposition. It will have to be considered at some later stage whether in the case where a mortgagee forecloses and goes into possession of a tenancy within the provisions and terms of the Central Provinces Tenancy Act under a decree in a foreclosure mortgage suit, the provisions of Ss. 46 and 47 of that Act would apply to any such case. We are rather inclined to think that they would not, because the mortgagee is in possession, not by virtue of the mortgage, but by virtue of a decree of the Civil Court founded upon the mortgage; and that consequently his possession is not attributable to the mortgage but to the decree in which the mortgage itself has become merged. It is unnecessary to decide this point inasmuch as in the present case the claim is based on trespass; and consequently we are of opinion that the jurisdiction of the Civil Court is not ousted, and we shall declare that this action is maintainable and that the decree pronounced by the Subordinate Judge was right and valid and cannot be impeached. Accordingly we discharge the Rule of the 12th February 1915 and maintain the decree of the Subordinate Judge as pronounced by him. We award to the plaintiffs their costs of this appeal.

Mullick, J.—I concur.

V.S./R.K. *Appeal dismissed.*

2. (1905) 2 C L J 359.

3. (1903) 16 C P L R 135.

A. I. R. 1916 Patna 197 (1)

SHARFUDDIN AND ROE, JJ.

Ses Lal Singh and another—Defendants—Appellants.

v.

Haldhar Narain and others—Plaintiffs—Respondents.

Second Appeal No. 2502 of 1914, Decided on 17th April 1916.

Specific Relief Act (1 of 1877), S. 42—Suit by trespasser for declaration that he is trespasser not maintainable.

The essence of S. 42, Specific Relief Act, is a title vesting in the plaintiff and, therefore, no suit will lie by a trespasser for a declaration that he is a trespasser. [P 197 C 2]

Karunamoy Ghosh—for Appellants.

Roe, J.—The facts of this case are, that the plaintiff brought a suit for a declaration that the finally published Record of Rights was incorrect, in that it stated that the plaintiff was holding land under the defendants at a rental of Rs. 18 per annum. The relief prayed for was a declaration that the land in question was a part of the plaintiff's milkiat, and that he paid rent to no one for it. The Munsif who tried the case found as a fact that the lands in suit had been leased in darpatni to the defendants, and that they had been again let out by the defendants at a rental of Rs. 18 per annum to the plaintiff. The suit was dismissed by the Munsif. In appeal to the District Court the learned Judge confirmed the finding of fact that the lands in suit formed part of the defendant's darpatni tenure, but he reversed the finding of the lower Court on the question of an attornment to pay rent. A declaration was, therefore, granted by the learned Judge which runs:

"that the plaintiff did not hold the land under defendants first party at Rs. 18 a year, though it was included in the darpatni and mustajiri of defendants first party."

Against that decree the defendants appeal. We must uphold the findings of fact arrived at by the learned Judge, but it is clear that the relief granted is in contravention of S. 42, Specific Relief Act. That section runs: "Any person entitled to any right as to any property may institute a suit." The essence of the section is a title vesting in the plaintiff. No suit will lie by a trespasser for a declaration that he is a trespasser. It is clear that the relief granted was in contravention of the terms of this section. The appeal is allowed, and the suit is dismissed with costs, the order of the Munsif being restored.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1916 Patna 197 (2)

CHAMIER, C. J. AND SHARFUDDIN, J.
Haboo—Applicant.

v.

Kariman—Opposite Party.

Criminal Revn, Petn. No. 83 of 1916, Decided on 3rd May 1916.

Criminal P. C. (5 of 1898), S. 260—Land lord tried for theft of tenants' crop worth Rs. 88—Tenants share not ascertained under S. 71, of Act (8 of 1885)—Summary tried held bad—Bengal Tenancy Act (8 of 1885).

Where a landlord was charged with theft for having cut and carried away some paddy in his tenant's possession valued at Rs. 88 and the Magistrate tried the accused summarily because the value of the tenants' share was less than Rs. 50:

Held: that, as the tenant was entitled to exclusive possession of the whole produce till division under S. 71, Ben. Ten. Act, the case should not have been tried summarily under Ch. 22, Criminal P. C. [P 198 C 1]

Khurshed Hussain—for Petitioner.

Judgment.—The applicant was convicted by a Magistrate of the first class of having cut and carried away some paddy, the property of one Kariman, and was sentenced under S. 379, I. P. C., to pay a fine of Rs. 50 or in default to suffer rigorous imprisonment for one month. The case was tried summarily and the first point taken in revision is that the Magistrate had no jurisdiction to try the case summarily, inasmuch as the charge was one of theft of property exceeding Rs. 50 in value. The complainant's case was that he was tenant of the land and entitled to share the produce with the landlord. In his complaint he valued the paddy that was carried away at Rs. 88. This valuation is not disputed, but it is contended on behalf of the complainant by way of supporting the conviction that the case was really one of theft of Rs. 44 worth of paddy inasmuch as the landlord and the tenant were each entitled to half of the crop. The answer to this is that under S. 71, Ben. Ten. Act, a tenant is entitled to the exclusive possession of the whole produce until it is divided. It seems to us that the applicant was charged with having stolen property worth Rs. 88 and, therefore, the Magistrate had no jurisdiction to try the case summarily. We set aside the conviction and sentence and direct that the case be retried according to law by some other Magistrate to be nominated by the District Magistrate. The fine, if paid, will be refunded.

V.S./R.K.

Conviction set aside.

A. I. R. 1916 Patna 198

CHAMIER, C. J. AND SHARFUDDIN, J.
Kartik Rewani—Plaintiff—Appellant.
v.

Central Karkend Coal Co., Ltd.—Defendants—Respondents.

Letters Patent Appeal No. 18 of 1916,
Decided on 29th June 1916.

Landlord and Tenant—Trespasser—Tenant can eject trespasser though he is supported by landlord.

A tenant is entitled to eject a trespasser from property in possession of the former, and the mere fact that the latter is supported in his defence by the landlord does not give him any right to retain the property as against the tenant. [P 200 C 2]

Saroshi Charan Mitter, Baikuntha Nath Mitter and Sailendra Nath Palit—for Appellant.

Pugh, Karunamoy Roy and Bankim Chandra Mukherji,—for Respondents.

Chamier, C. J.—This is an appeal against a judgment of a learned Judge of this Court setting aside a decree passed by the Additional Subordinate Judge of Manbhum which affirmed a decree of the Munsif of Dhanbaid. The appellant before us was the plaintiff in the suit. He claimed a decree for khas possession of a tank. He alleged that the tank had been excavated by his paternal grandfather, and had been held by his grandfather, his father and himself in niskar right, that is, in some kind of rent free tenure. He alleged that his grandfather, his father and he himself in succession had held possession, that while his father was in possession of the tank the defendant Company took water and earth from it and paid his father therefor, that in 1319 Fasli the defendant Company laid claim to the tank, that there was a case in the Criminal Court which was decided against the plaintiff, and hence the plaintiff was compelled to bring the present suit. The defendant Company denied that the plaintiff or his father or grandfather had ever been in possession of the tank. They denied that the tank had been excavated by the plaintiff's grandfather and they pleaded that in 1906 they took possession of the tank upon the verbal permission of the Manager of the Raja of Jharria who is said to be the owner of the land, and that after taking possession they had improved the tank in various ways by deepening it and raising banks round it. The Munsif found that the plaintiff had failed to prove his

niskar right in the tank but that all his other allegations had been established. In particular, he found that the plaintiff had proved that the tank had been excavated by his grandfather, that it was the property of the plaintiff at the date of suit, and that it had been in his possession all along. The Munsif found also that the defendant Company had failed to prove that they had obtained permission from the Raja's Manager to take possession of the tank. On appeal the Additional Subordinate Judge confirmed the finding of the Munsif. He said that it was proved that the tank had been excavated by the grandfather of the plaintiff more than 30 years before the suit, and that the plaintiff, his father and grandfather had all along been in possession.

He definitely rejected the evidence adduced by the company to prove that the Raja had given permission to the company to take possession, and accordingly he confirmed the Munsif's decree in favour of the plaintiff. On second appeal to this Court the learned Judge before whom the case came observed that on the findings of the Court below the plaintiff was entitled to succeed if at all on the strength of long continued possession, that a person suing merely on the strength of long continued possession was no doubt entitled to a decree for possession against a trespasser by whom he had been ousted, but that the defendant company was not in the position of a trespasser inasmuch as the company was being "supported in the suit" by the Raja who was the landlord, and that the company "must be considered a permissive occupant and its possession co-ordinate to that of the plaintiff." Before dealing with the ground upon which the learned Judge of this Court dismissed the plaintiff's suit, I propose to deal with other contentions which have been advanced by learned counsel for the company. In the first place it was urged that in a suit for ejectment the plaintiff must recover *secundum allegata et probata*.

Learned counsel contended that inasmuch as the plaintiff had failed to prove that he and his ancestors held the land in niskar right the suit should have been dismissed, that the plaintiff should not have been permitted to succeed on the strength of possession, however long con-

tinued, that the defendant Company had had no notice of such a case and had had no opportunity of meeting it. There appears to me to be no force in this contention. Every single allegation of the plaintiff has been proved except the allegation that he held the tank in niskar right. The Court of first instance and the Subordinate Judge held that that allegation had not been proved because the plaintiff had not produced any document in support of it. Both Courts, however, as I read their judgments, went further and held that the plaintiff had proved that he was the owner of the tank. The plaint contains repeated allegations that the plaintiff and his ancestors had been in possession all along. These allegations were definitely denied by the defendant Company who alleged that the possession had all along been with the Raja. Evidence on the question of possession was produced on both sides and there is no ground whatever for the suggestion that the defendant Company was taken by surprise in having to meet the allegations regarding possession. Next, it was contended that such possession as has been proved by the plaintiff was not possession of the kind which would entitle him to succeed even as against a trespasser. It was said that his possession was either secret or permissive or possibly that of a mere squatter, that, at best, he was a kind of tenant-at-will liable, to be ejected by the Raja at any time and that, inasmuch as it had been found that the Raja was supporting the defendant Company, the latter was in a better position than the plaintiff, therefore the plaintiff whether a tenant or a person who had encroached upon his landlord's land was not entitled to succeed against the defendant company which was claiming under the Raja. The answer to all this is that the findings of the Court below show very clearly that the plaintiff's and plaintiff's ancestor's possession was neither secret nor permissive nor that of a mere squatter.

It was open and long continued to the knowledge of the defendant company, which actually dealt with the plaintiff's father as the person in possession and the person entitled to dispose of the water. Nor is the defendant company in the position of a person claiming under the landlord. Its attempt to prove that it obtained the permission of the landlord to take

possession of the property has failed. It may be, as contended by counsel, that it is entitled to prove facts which occurred after the institution of the suit at any time up to the filing of the written statement. But it has neither pleaded nor proved any claim under the Raja other than that set out in para. 12 of the written statement which has been negatived by the findings of the Courts below. Next it was said that the suit is barred by the provisions of S. 139 (5), Chota Nagpur Tenancy Act, which lays down that all applications to recover occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord shall be instituted in the Court of the Deputy Commissioner and not in any other Court. This point was not taken either in the first Court, or in the Court of First Appeal, nor was it taken in the memorandum of appeal to this Court. The defendant company served a notice on the plaintiff that it intended to raise the point at the hearing before the learned Judge who decided this case in this Court, but apparently did not put it forward. In my opinion there is no force in it. There is nothing to show that the plaintiff in this case is a tenant within the meaning of the Act. He has certainly not been ejected by his landlord and on the findings it is impossible to hold that the defendant company claims under or through the landlord. Next it was contended that the defendant company is entitled to retain possession of this land under the lease of the colliery which was granted by the Raja.

The defendant company is by reason of various intermediate assignments in the position of a lessee of the colliery. It is said that the lease contains a clause authorising the company to take parti land required for the service of the company at the rate of 4 annas a bigha. It was neither pleaded nor proved that the tank now in question was required for the service of the company, and on the findings it is impossible to hold that the tank is parti land within the meaning of the lease. And this brings me to the last point which has been urged by the learned counsel for the company, namely, that the company is entitled to resist this suit because it is being "supported" by the Raja. This expression is used by the

Court of First Appeal and it was relied upon by the learned Judge of this Court. I do not know what the Court of First Appeal meant by saying that the defendant company was being "supported" by the Raja. As far as I can ascertain, it meant no more than that the company was being assisted in its defence by the Raja. It appears to me that such support by the Raja gives the defendant company no right whatever to retain the land against the plaintiff and, when the learned Judge of this Court held that the support of the Raja placed the company in as good a position as that of the plaintiff, I think he must have overlooked the important finding by the lower appellate Court that the company had failed to prove the permission of the Raja pleaded by them. The defendant company was, in my opinion, in the position of a trespasser at the date of this suit and the fact that the Raja "supported" the defence does not put the company in any better position. For these reasons I am of opinion that this suit should not have been dismissed by this Court. I would allow this appeal and set aside the judgment of the learned Judge of this Court and dismiss the appeal to this Court with costs of both hearings. The result is that the suit will be decreed with costs throughout.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 200

ROE AND JWALA PRASAD, JJ.

Bayan Ali and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 119 of 1916, Decided on 2nd June 1916, against order of Sess. Judge, Mozufferpore, D/- 18th April 1916.

Penal Code (1860), S. 342—Charge under S. 342—Complainant filing petition that case being compromised he did not want to proceed — Magistrate must examine complainant on petition—Petition was one of withdrawal and trial did not come to end—Criminal P. C. (1898), Ss. 248 and 345.

The Police submitted a charge-sheet against the accused under S. 342, I. P. C. On the day fixed for the hearing of the case the complainant filed a petition in the following terms:

"This case . . . by the intervention of arbitrators has been compromised. Hence the petitioner does not want to proceed with the case and to get his witnesses examined, so this petition is filed and it is prayed that the case may

be struck off without hearing." The Magistrate examined the complainant and found that there had been no compromise:

Held: (1) that it was the duty of the Magistrate to examine the complaint in order to satisfy himself that the petition was really one of compromise. (2) That the petition was one of withdrawal under S. 248, and not one of compromise under S. 345, Criminal P. C., and therefore, the trial did not come to an end on its presentation: 21 Cal 103; 3 C W N 332 and 13 Bom 600, Ref. [P 202 C 1, 2]

R. A. Baxter, Sarat Kumar Banerji and Bankim Chunder Dey—for Petitioners.

Fakruddin—for the Crown.

Judgment.—The facts of this case are as follows: On 30th January 1916 at 6 a. m. the complainant Raghunaek Misser reported at the Bagaha Police Station that one hour before sunset on the previous day his brother Makut Nath Misser had been wrongfully confined by the accused Bayan Ali, a Sazawal of the Bettiah Raj, with the help of the patwari and the peons of that Raj. The Police investigated this information and submitted a charge-sheet against the accused, fixing 10th February 1916 for trial and recording that they had directed the complainant and his witnesses to appear at the Bettiah Court on that day. On 10th February 1916 the prosecution witnesses and the accused appeared before the Sub-Divisional Officer and a petition was filed by the complainant Raghunaek Misser which has been translated thus:

"As this case is between the amlas of the Raj on one side and your petitioner the raiyat of the Raj on the other, therefore by the intervention of arbitrators it has been compromised. Hence the petitioner does not want to proceed with the case and to get his witnesses examined, so this petition is filed and it is prayed that the case may be struck off without hearing."

Upon this the Sub-Divisional Magistrate wrote:

"This may be forwarded to Superintendent of Police. Complainant states to me that his case is true but he wishes to withdraw it because he is a Raj asami and accused are Raj servants. This however scarcely seems sufficient reason."

Upon this the Court Sub-Inspector wrote to the Superintendent of Police:

"I humbly beg to state that in the marginally noted case the complainant has filed a petition of withdrawal which has been forwarded by the Sub-Divisional Officer to your honour. I therefore beg to send herewith the judicial record of the case along with case diaries and the petition of withdrawal filed by the complainant for your honour's perusal and orders. The next day fixed for this case is 17th February 1916."

Upon this the Superintendent of Police wrote:

"I am not willing to withdraw the case but have no objection to the case being compromised."

On 17th February the prosecution witnesses were examined and the accused examined and a charge framed and the case was adjourned to the 28th for cross-examination. On 28th February the mukhtear appearing for the accused applied for an adjournment in order that the accused might obtain the assistance of the Raj in his defence, and the case was thereon adjourned to 13th March. There is on the record a letter which runs:

"correspondence between the Collector and the Estate to defend the case at Raj expense is going on but no sanction has yet been received."

There is also on the file a letter from Mr. Hudson, Assistant Manager of the Raj, saying that the Pleader engaged in the case on behalf of the Raj was unable to appear and asking for an adjournment. The case was continued and ended in the conviction of the accused and upon appeal to the District Judge the findings of facts of the Sub-Divisional Court were confirmed and the sentences confirmed. The applicant comes before us in revision on two grounds: Firstly, that the petition of 10th February was in fact a petition of compromise and secondly, the sentence of three months imprisonment is excessive. The first point for consideration in this case is—Was the petition of 10th February clearly a petition of compromise? The Sub-Divisional Magistrate and the Superintendent of Police did not regard it as such. The actual words used are "sulah ho gaya." No mention is made of the section under which the petition was filed. The first half of it might be taken as a petition of compromise; the second half of it as a petition of withdrawal. The words which have been translated "without hearing" are "*bila tajwiz file bakian se kkarij farmaya jawe.*" "Compromise" is a word which in itself contemplates an arrangement to which there are two parties. "Withdrawal" has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under S. 248 without the consent of the accused. It was clearly open to the Sub-Divisional Magistrate to satisfy himself under what section this petition was before him. In order to satisfy himself it was open to him to question the complainant. The answers of the complainant clearly indicate that the case

had not been compromised but was being withdrawn without the consent of the accused. The subsequent action of the accused shows clearly that he had never consented to the compromise of the case.

The fact that the European Officers of the Raj were personally interesting themselves in the matter, indicates that through them the accused must have been aware that the Police were willing that the case should be compromised, and unwilling that it should be withdrawn. If in fact the case had been compromised, there was no reason why the accused should not have drawn the attention of the Magistrate to the fact. Not only did he not do so in the Sub-Divisional Court, but nowhere in his grounds of appeal or in the argument in appeal has he suggested to the Sessions Judge that the case had with his consent been compromised.

On behalf of the Crown our attention has been drawn to the decision in *Murray v. Empress* (1) and on behalf of the appellant to the case of *Abdool Biswas v. Khater Mondal* (2). That case is authority only for the proposition that where a Magistrate has satisfied himself that the complainant understood his petition and really desired to compound the case, the case must be compromised. Even this decision contemplates a questioning of the complainant in order that the Magistrate may be satisfied that the application is in fact one for composition and not for withdrawal. On this point Mr. Baxter further urges that inasmuch as the case was a warrant case it could not be withdrawn and, therefore, the petition could not have been one under S. 248. In this connexion we may refer to the case of *Ganesh Narayan Sathe, In re* (3):

"The Magistrate had no authority to allow the complainant to be withdrawn and he ought to have informed the complainant thereof."

It appears to us that this is precisely the course which the Magistrate took. He was willing that the Police should enter a nolle prosequi but he was not willing that the complainant should withdraw the case and informed him that he would not allow him to do so. The Superintendent of Police went further and said, "apart from the provisions of

S. 345 the complain shall not be withdrawn." We are of opinion that the trial did not come to an end upon the petition of 10th February 1916, that that petition was not a petition made under S. 345 and that the subsequent proceedings were in order and that no error of law exists upon which we can interfere under S. 439. With regard to the sentence of three months' imprisonment, we are in agreement with the remarks of the learned Sessions Judge and of the Sub-Divisional Magistrate in respect to the serious nature of the applicant's interference with the liberty of Makut. At the same time it is difficult to lose sight of the remarks made by the Sub-Divisional Magistrate in the course of his judgment

"that the occurrence could not be considered by the submissive and backward people living to the north of this subdivision a very abnormal one or one that they should get wildly excited about. The surprising thing is that it has come to Court at all."

The actual facts of the case are that Makut Nath was tied to a post by a grass rope and was given a shawl in which to wrap himself, and on his release was so little indignant at the treatment he had received that he sat down cheerfully and listened to the recitation of psalms in the house in which he had been tied up. It is clear that the people were unconscious of any offence involving grave criminality and that the applicant did not realise that he was doing anything heinous. The applicant has been only three days in jail but has been taken to jail twice, once upon the completion of the trial in the Sub-Divisional Court and once on his surrendering to his bail on 9th May. He was released by the Sessions Judge on the day after his conviction and by ourselves one day after his surrender. Nevertheless we think that the punishment inflicted is sufficiently deterrent to his offending in this manner again, and justice does not require that we should send him back to jail. We do not propose to increase the fine imposed upon him, for the reason that although the Raj has done all it could in giving him the best legal advice available, it will not overlook such unwarrantable abuse of power. We direct that the sentence of imprisonment be remitted. The applicant is released from his bail. With the conviction and the sentence of fine imposed upon him and his co-accused, the peons Seopujan Singh,

1. (1894) 21 Cal 103.

2. (1899) 3 O W N 332.

3. (1889) 13 Bom 600.

Sarup Rai and Timal Mian, we do not see any reason to interfere. There is no finding of fact that the patwari Jaleswar Lal did anything to facilitate the commission of this offence. The conviction of, and sentence upon, Jaleswar Lal are set aside.

V.S./R.K. *Revision partly accepted.*

A. I. R. 1916 Patna 203

ROE AND JWALA PRASAD, JJ.

Jwala Prasad—Defendant—Appellant
v.

Protap Udai Nath Sahi Deo and another—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1413 of 1915, Decided on 14th July 1916, against the decree of J. C., Ranchi, D/-26th April 1915.

(a) **Hindu Law—Alienation—Coparcener—Charge by one member does not survive term.**

One member of a Mitakshara joint family cannot deal with his share in the property of the joint family so as to create a charge which will survive him. On his death the charge created by him is extinguished and every member of the joint family, whether born before or after the creation of the charge, is entitled to plead that no charge subsists upon the joint family estate: 3 B. L. R. 31 (F. B.); 3 Cal. 198 (P. C.); 5 Cal. 148, (P. C.); 5 Cal. 855; 18 Cal. 157 (P. C.) and 42 Cal. 1068, Ref. [P 201 C 1, 2]

(b) **Contract Act (1872), S. 134—Surety—Liability of, where claim against principal is barred whether survives—Quaere.**

Quaere.—Whether the liability of the surety is kept alive by reason of a charge upon his property for the satisfaction of the debt of the principal debtor where the latter's liability has been extinguished by limitation: 24 All. 501; 5 Bom. 647; 28 Bom. 248; 12 Cal. 330 and 33 Mad. 308, Ref. [P 203 C 2]

Guru Saran Prasad—for Appellant.

Tribhuban Nath Sahai and Sakti Kanta Bhattacharji—for Respondents.

Roe, J.—The plaintiff in this case is a landlord under whom one Mt. Lalit Kueri had a tenancy, upon which, on 4th October 1904, Rs. 2,300, was due as rent. The plaintiff agreed that he would forego interest upon this sum if the lady would execute an instalment bond with one substantial security. That substantial security was found in one Kanhaiya Lal. He pledged property belonging to a joint family of which he was the head to secure the instalments which Lalit Kueri had undertaken to pay. In course of time the lady began to fall into arrears with her instalments. From 30th Asarb, Sambat 1962, she has paid nothing. The plaintiff therefore sues to enforce his mortgage security against the sons of Kanhaiya Lal,

who is now deceased. One of these sons Gopi Lal was alive at the time of the execution of the surety bond. The other Jowala Prasad was born later. It is admitted that if the period of limitation in a suit, such as this, is six years then the sums falling due in Sambat 1962 and Sambat 1963 are barred by limitation. The lower Courts have concurred in holding that limitation as against Gopi Lal must be six years as there is no charge upon his interest in the property, and against this decision there is no appeal. They have also concurred in holding that Jowala Prasad took his share in the property subject to the undertakings already entered into by the father Kanhaiya Lal, and that therefore, he cannot avoid the charge created by the indemnity bond and that while that charge subsists, limitation must be held to run under Art. 132. *

Against this decision Jowala Prasad appeals. The questions for decision are: (1) A Mitakshara father has purported to create for a purpose, not connected with the family, a charge upon the property of a joint family of which he was the head. Can that charge be enforced after the death of the father against a son born into the joint family subsequently to the transaction? (2) Where a principal debtor's liability has been extinguished by limitation, can the liability of his surety be kept alive by reason of a charge upon the surety's property for the satisfaction of the debt of the principal? Were it necessary to consider the second question I should ask that the appeal be heard by a Full Bench. The conflicting rulings on the point are *Sheo Kumar v. Narain Das* (1) on one side and *Hajarmal v. Krishnarav* (2), *Gopal Daji Sathe v. Gopal* (3), *Krishto Kishori Chowdhrair v. Radha Romun Munshi* (4) and *Subramania Aiyar v. Gopala Aiyar* (5) on the other. It would seem that many sections of the Contract Act indicate that the Allahabad view is the correct view. I am satisfied that the first question must be answered in the negative. In *Sadabart Prasad Sahu v. Foolbash Koer* (6) the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that according to the

1. (1902) 24 All 501.
2. (1880-81) 5 Bom 647.
3. (1904) 23 Bom 248.
4. (1886) 12 Cal 330.
5. (1910) 33 Mad. 308=7 I C 898.
6. (1869) 12 W. R. 1 (F B).

Mitakshara law, as received in the Presidency of Fort William, one coparcener had not authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for benefit of the family. In *Deendyal Lal v. Jugdeep Narain Singh* (7) it was held that the purchaser of undivided property at an execution sale during the life of the judgment-debtor for his separate debt does acquire his share in such property with the power of ascertaining and realising it by a partition. But in *Suraj Bhunsi Koer v. Sheo Prasad Singh* (8) it was held to be clear that if no proceedings had been taken to enforce the debt in their father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands.

In *Luchmun Dass v. Giridhur Chowdhry* (9) it was held that even during the lifetime of the father the mortgagee would be entitled only to a decree directing the debt to be raised out of the whole ancestral estate including the mortgaged property. In *Madho Parshad v. Mehrban Singh* (10) it was clearly laid down that any one of several members of a joint family is entitled to require partition of ancestral property, but so long as his interest is indefinite he is not in a position to dispose of it at his own hand, and for his own purpose. In a recent Full Bench decision of the Calcutta Court, *Bidya Prasad Singh v. Bhupnarain Singh* (11), it was stated that where property mortgaged by a father for purposes not connected with the joint family, devolves upon the sons by survivorship, there is no charge on it enforceable against the sons. It seems to me immaterial that the joint family consisted of only one son at the time of the mortgage, and of two sons at the date of the father's death. It is sufficient to say that there was at the time of the attempt to create a charge upon the property a joint family in existence and that upon the cases I have quoted it is clear that one member of a joint family cannot deal with his share in the property of the joint family so as to create a

charge which will survive him. On the death of Kanhaiya Lal the charge created by him was extinguished, and every member of the joint family is entitled to plead that no charge subsists upon the joint family estate. In this view limitation must be governed by Art. 120, not by Art. 132. The kists which fell due in 1962 and 1963 are barred both as against Jowala Prasad and against Gopi Lal. The appeal is to this extent decreed. In view of the attempt made by the appellant to avoid liability for the whole debt we direct that each side pay his own costs throughout the litigation.

Jwala Prasad, J.—I agree with the order proposed.

V.S./R.K. *Appeal party accepted.*

A. I. R. 1916 Patna 204

MULLICK, J.

Pirthi Chand Lal Choudhry—Defendant—Appellant.

v.

Mohamed Tahir—Plaintiff—Respondent.

Second Appeal No. 2434 of 1914, Decided on 5th April 1916, from decision of Dist. Judge, Purneah, D/- 19th May 1914.

(a) Bengal Tenancy Act (8 of 1885), S. 50—Applicability—Suit for declaration that Record of Rights is incorrect—Act does not apply—Evidence of long payment of rent at unchanged rate—Presumption.

A suit for a mere declaration that the Record of Rights is incorrect is not one governed by the Bengal Tenancy Act. But even in a suit not governed by the Act, the fact of long payment of rent at an unchanged rate is evidence as showing that the holding is a fixed rate holding: 6 I. C. 217 and 35 Cal. 763, *Ref.* [P 205 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 115—Payment anterior to publication of Record of Rights—Admissibility.

The evidence of payment anterior to the publication of the Record of Rights is admissible. 12 C. W. N. 904, *Ref.* [P 205 C 1]

Mahomed Tahir—for Appellant.

Judgment.—The plaintiff is the tenant and the defendant is the landlord. The plaintiff sues for a declaration that the entry in the Record of Rights showing his holding to be a kaimi jama is wrong and that his correct status is that of a raiyat at fixed rates paying rent at the rate of Rs. 19 per annum. The learned District Judge finds, firstly, that the suit is under the Tenancy Act, and secondly, that the plaintiff has by evidence and by invoking the assistance of S. 50, Ben. Ten. Act, established that he is a

7. (1877-78) 3 Cal 198=4 I A 247 (P C).

8. (1888) 5 Cal 148=6 I A 88 (P C).

9. (1880) 5 Cal 855.

10. (1891) 18 Cal 157=17 I A 194 (P C).

11. (1915) 42 Cal 1068=29 I O 629.

raiyat at fixed rates as claimed. The landlord prefers this second appeal and the first point taken in his behalf is that this is not a suit under the Tenancy Act at all, and that if the suit is not one under that Act, the presumption under S. 50 cannot apply. Now the relief which the plaintiff claims in the present suit is not a relief conferred by or based upon any provision of the Bengal Tenancy Act. The relief is for a mere declaration such as under the general law of the country the plaintiff is entitled to claim. It cannot in my opinion be said that the suit is one under the Tenancy Act, but because the suit is not one under the Tenancy Act, it does not follow that the decision of the learned appellate Court is wrong in law. The learned Court was competent to take into consideration the evidence of long payment of rent at an unchanged rate as showing that the plaintiff had a holding at fixed rates. The case of *Golab Misser v. Kumar Kalanand Singh* (1), following *Nunda Lal Gossami v. Atarnsni Dassi* (2), is direct authority in the plaintiff's favour.

The next contention of the learned vakil for the appellant is that under S. 115, Ben. Ten. Act, evidence of payment anterior to the publication of the Record of Rights was not admissible. That however, has been shown to be an erroneous proposition in *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (3). The result, therefore, is that the appeal fails and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

1. (1910) 6 I C 217.
2. (1908) 35 Cal 763.
3. (1908) 12 C W N 904.

A. I. R. 1916 Patna 205

ROE AND KINGSFORD, JJ.

Ram Kumar Lal—Appellant.

v.

Kesho Prasad Singh and others—Respondents.

Misc. Civil Appeal No. 59 of 1916, Decided on 18th July 1916, from order of Dist. Judge, Shahabad, D/- 20th December 1915.

Limitation Act (5 of 1908), Art. 182 (6)—Limitation runs from date of order of issue of notice under—Civil P. C. (5 of 1908), O. 21, R. 22.

Under Art. 182 (6), Lim. Act, limitation begins to run from the date of the order of the Court issuing notice to the judgment-debtor: 27 *Bom.* 622 and 30 *All.* 536, *Foll.* 22 *W. R.* 484, *A. I. R.*

1914 *Cal.* 760; 7 *C. W. N.* 656 and 10 *C. W. N.* 303 and 30 *Mad.* 30, *Ref.* [P 206 C 1]

Kulwant Sahai and Ambika Prasad Upadhyaya—for Appellant.

Rajendra Prasad for Chandra Sekhar Prasad Singh—for Respondents.

Roe, J.—The point for decision in this appeal is, whether the application for execution is time-barred or saved by the issue of a notice under O. 21, R. 22. The decree is dated 14th March 1902. The third application for execution was made on 7th January 1909 and the presiding officer of the Court made an order on 14th January 1909 that notice should issue upon the judgment-debtor. That notice was drawn up and signed by one of the amlas of the Court for the Sheristadar on 14th January 1909 and made over to the Nazir for service on 15th January 1909. On 16th January 1909 the Nazir gave the notice to a peon, who served it on 26th January 1909. The proceedings were dismissed for default on 16th February 1909. The fourth application was made on 16th January 1912. The question for decision is whether this application is barred by limitation, or in other words, from what date does limitation run under Art. 182, Cl. 6. The learned District Judge has held that there is a general *cursus curiae* in Calcutta that limitation shall run from the date of the delivery of the notice to the process server. With great respect to the learned Judge we have been unable to find any such *cursus curiae* in the cases referred to in the argument before us.

The first case is that of *Koonj Beharee Lall v. Girdharee Lall* (1), in which it is stated that the date was

"certainly within three years from 10th September 1871 when notice was served upon the judgment-debtor under S. 316, Civil P. C."

The idea that limitation runs from the date of service upon the judgment-debtor has been specifically denied in *Jugol Kishore Marwari v. Chintamani Roy* (2). In *Kadaressur Sen Babor v. Mohim Chandra Chakravarti* (3) it is stated that limitation must run from the date of the issue of notice, but I am unable to see anywhere in that ruling any specification of what actually constitutes an issue of notice. In *Ratan Chand Oswal v. Deb Nath Barua* (4), which follows this ruling, there is also nothing to show what

1. (1874) 22 *W R* 484.
2. *A I R* 1914 *Cal* 760=24 *I C* 80.
3. (1902) 6 *C W N* 656.
4. (1906) 10 *C W N* 303.

specific ministerial act constitutes an issue of notice. Pargiter, J., was in this case most reluctant to hold that any ministerial act could give rise to the starting point of limitation and only accepted the judgment written by his learned brother on the ground that he was bound by the decision in *Kadaressur Sen Babor v. Mohim Chandra Chakravarti* (3). In *Cheruvath Thalungal Bapu v. Nerath Thalangan Kanaran* (5), *Ratan Chand Oswal v. Deb Nath Barua* (4) was followed. In *Damodar Shaligram v. Somaji* (6) and in *Jamai Kanjar v. Abdul Karim Khan* (7) it has been held that the only reasonable date from which limitation should run is the date of the order of the Court issuing the notice.

The argument before us leads us to accept the views expressed in Allahabad and Bombay, for the reason that it is impossible to say on the Calcutta cases what particular ministerial act constitutes an issue of notice. It is suggested that a notice remains unissued so long as it remains in the Nazir's hands. This I cannot believe to be the correct interpretation of the word "issue". It may be reasonable to say that issue means issue under the Court's seal to the process-server, but it is unnecessary to decide in the present case whether the date of the issue of notice should be the date when the Court orders a notice to issue or the date when the sheristadar actually signs it on behalf of the Court. It is sufficient to say that the date of issue is not the date on which the Nazir actually selects a peon for the carrying out of the orders of the Court. The date upon which the notice came to the Nazir from the vernacular office was 15th January 1909, and the next application for execution is dated 16th January 1912. I hold that upon that date execution was barred. The appeal is decreed with costs. Hearing fee three gold mohurs.

Kingsford, J.—I agree.

V.S./R.K.

Appeal allowed.

5. (1907) 30 Mad 30.
6. (1903) 27 Bom 622.
7. (1908) 30 All 536.

A. I. R. 1916 Patna 206

ROE AND JWALA PRASAD, JJ.

Ebadut Ali—Plaintiff—Appellant.

v.

Muhammad Fareed and *others*—Defendants—Respondents.

First Appeal No. 10 of 1914, Decided on 25th May 1916, from decision of Sub-Judge, Purnea, D/- 30th August 1913.

(a) **Mortgage—Consideration—Presumption—Burden of proof when shifts stated—Primarily is on mortgagor—It shifts to mortgagee when probably mortgagor exempted it without consideration.**

Where it is pleaded that no consideration passed for a mortgage, the burden of proof is on the mortgagor to establish it. Where the mortgagor makes a statement of fact which renders it probable that he executed the document without consideration, the onus is shifted on to the other side. The initial presumption however, where the document is in the hands of the mortgagee, is that consideration passed for it. [P 207 C 2]

(b) **Mahomedan Law—Alienation—De facto guardian—Mother—Burden of proof of minor's benefit is on alienee—Discharge of brother's debt who had no interest in property does not justify alienation unless satisfied by minor.**

Where a Muhammadan mother, as de facto guardian of her minor son, undertakes to alienate or encumber his property, the burden of proof is on the alienee or mortgagee to prove that the transaction was for the benefit of the minor. The discharge of a debt of the minor's brother, who had no interest in the minor's properties, is not for the minor's benefit and an alienation effected for such a purpose is void as against the minor, unless accepted by him on his attaining majority: 34 Cal 36 and 34 Cal 65, *Foll.* [P 208 C 1]

(c) **Registration Act (16 of 1908), S. 35 (3)—Execution not admitted—No registration can be made—What is execution and its admission stated.**

A Registrar cannot register a document whose execution is not admitted by the alleged executant. [P 209 C 1]

Execution of a document consists in signing a document written out and read over and understood and does not consist of merely signing a name upon a blank sheet of paper. To be executed, a document must be in existence; where there is no document in existence, there cannot be execution. Where an executant clearly says that he signed on a blank paper and that the document which he had authorized is not the document which he contemplated, the statement is a denial, not an admission of execution: 6 C W N 329, *Dist.* [P 209 C 2]

Nuruddin Ahmad—for Appellant.

Mustafa Khan—for Respondent.

Judgment.—The plaintiff in this case was one Ebadut Ali. He appears to have been the agent of a family to whom had been given a 'patni' grant of the property now in question. From time to time various members of this family took loans from Ebadut Ali, and on three occa-

sions executed mortgages in his favour. The dates of these mortgages are, the 13th Jet 1306, for Rs. 2,500, by Mt. Jharkhun and Muhammad Latif, corresponding in date to 28th May 1899; 17th May 1900 for Rs. 1,000 by Muhammad Latif alone, and 15th October 1903 for Rs. 1,000 by Mt. Jharkhun and her six children, Muhammad Fareed, Muhammad Latif and four daughters. In this last mortgage there is a proviso, that the mortgagee shall pay to the zamindar to protect the property from sale the rent due to the zamindar, and shall add to the sum for which the property is held in lien all sums so paid to the zamindar with interest at two per cent. per mensem. The property mortgaged came into possession of this family by a deed of gift, and on a previous litigation it has been found, that each member of this family holds a one-seventh share in the property. This finding has been accepted as defining correctly the rights of the mortgagors. Ebadut Ali has a brother Nijabut. He, from time to time, has purchased approximately a nine-annas share in this property from Mt. Jharkhun and members of her family; and one Shillingford is in possession of 7-annas, by virtue of purchases from other members of the family, and of a 'durpatni' of the interest of the eldest son Muhammad Latif.

Ebadut Ali now sues to recover his mortgage-money, and after adding the interest due on the various mortgages, and the sums alleged to have been paid to the zamindar in payment of rent, and deducting therefrom nearly Rs. 7,000 paid as interest, the total amount of his dues is said to be Rs. 11,970. In the lower Court no member of the mortgagors' family contested the suit, nor did Nijabut enter into contest. The only contest was that put forward by Mr. Shillingford, and the grounds of that contest were: firstly, that the mortgages were void for want of consideration; secondly, that Nijabut was a 'benamidar' for Ebadut in the purchase made from the mortgagors of the right of redemption; thirdly, that the mortgages had been extinguished by the enjoyment by Ebadut of the property as agent of the mortgagors and that he had placed to his own credit, from the funds coming into his hands on behalf of the mortgagors, a sufficient sum to redeem the mortgages; and lastly, that Mr. Shillingford was not required to re-

deem the mortgages to save his 'durpatni' interest in the property. These points were found in favour of the plaintiff Ebadut Ali. The only point upon which Ebadut Ali feels a grievance under the decree is, that no decree has been made for the sale of the 'durpatni' to defray the mortgage-debt. Upon this ground he appealed and Shillingford filed a cross-appeal, taking for the most part the grounds urged in the lower Court.

On the appeal coming on for hearing, Mr. Mustafa Khan for the appellant concedes that his appeal is without substance. The 'dur-patni' certainly cannot be sold, though it may be voidable at the instance of the auction-purchaser if the mortgage-debt is not paid. The appeal is dismissed with costs. Upon the cross-appeal we take in order the grounds urged in the lower Court. The first is, that no consideration passed under this mortgage. Where a document is in the hands of the mortgagee the presumption is that consideration passed. The first step in the throwing of the burden of proof upon the other side, is a statement of fact which might render it probable that the mortgagor would execute a mortgage without consideration. No such statement of fact has been put before us. There is nothing to suggest any temptation on the part of Muhammad Latif and the family, of which he was the head, to execute a document without consideration. We agree with the learned Subordinate Judge that there is nothing to suggest that no consideration passed, and that we must accept the statement set forth in the deeds themselves that consideration did pass.

The second point is, whether Nijabut is the 'benamidar' for Ebadut. Beyond the fact that he is his brother there is nothing on the record to suggest a 'benami' transaction. The evidence of possession by Ebadut in the nine annas purchased is given by witnesses entirely unreliable. There are only three of them, and two of them are the brother and debtor of Shillingford's patwari. We agree with the conclusions arrived at by the lower Court, that there is nothing to show that Ebadut and Nijabut are the same person, or that Ebadut has any interest in the equity of redemption.

The third point for consideration is, whether in the appropriation to himself of the proceeds of this property Ebadut

has recouped himself to the full of the mortgages on the property. Here again we find ourselves in great difficulty owing to the paucity of the evidence upon the record upon this issue. There is very little to show what is the actual value of the property. We know as a fact, that the family consisted of seven members, and they have apparently been living in some comfort since the date of the death of Goghan, by whom this deed of gift was made. It is obvious that large sums must have been paid to them from time to time by Ebadut. It is not suggested by themselves, that the whole of the amount due under the mortgages has been paid up, and though we can see that it is very difficult indeed for a third party to show substantially how much has gone into the hands of Ebadut in satisfaction of the mortgages, and how much into the hands of the mortgagors for their maintenance, the burden of proof is on the third party to show that Ebadut has, from time to time, taken from the estate sufficient to clear off the mortgages. We find as a fact that there has not been any payment beyond the payments admitted in the plaint. The next point, which does not seem to have been argued in the lower Court but which is obvious on the face of it in this Court, is, that there is nothing on the record to show that Fareed derived any benefit in this mortgage. He was a minor at the time of the execution. The execution was made and admitted by his mother.

The case law on the subject has been fully expounded in *Mafaza Hosain v. Basid Sheikh* (1) and *Ram Charan Sanjal v. Anukul Chandra Acharjya* (2). It is settled that where a Muhammdan mother as de facto guardian undertakes to alienate or encumber her minor son's property, the burden of proof is on the alienee or mortgagee to prove that the transaction was for the benefit of the minor. In the document itself it is set forth that the money is being borrowed for the liquidation of a debt due by Muhammad Latif. Clearly the paying up of his brothers's debt, though a fine act, was a quixotic act, not an act in itself for the benefit of the minor. Such a transaction could not be entered into by the mother, and is void against the minor unless accepted by him on his attaining

his majority. There is no evidence on the record of his having accepted the liability incurred by his mother. We hold that the mortgage does not cover the right, title and interest of the minor Fareed. We hold that it does cover the interest of Mt. Jharkhun and Muhammad Latif. How far it covers the interest of the other four daughters will be considered in due course. The last point taken by the learned vakil for the appellant is, that the account taken by the lower Court is on the face of it wrong, that it is an exorbitant and monstrous account, and that in equity this Court should interfere and re-arrange that account. We are put to great difficulty in this matter owing to the supineness of the respondent in the lower Court. He does not seem to have troubled to appear before the lower Court's officers to contest the account that was to be made. The result was that the account was made by those officers on the representations of the plaintiff only.

We are asked to remand the case upon this point and to direct that a commission be issued for the taking of an account, that the plaintiff be put to the proof of payments made to the zamindar, and to the proof also that these payments were made from his own pocket and not from the money which came into his hands from the profits of the estate, of which he was, on behalf of the mortgagors, the agent-in-charge. There is at the outest an error in the account, inasmuch as for the second mortgage the interest is calculated $1\frac{1}{2}$ per cent. per mensem instead of at $\frac{1}{2}$ per cent. per mensem as set forth in the deed itself. There is also another patent error in these accounts, and that is, that they have all been mixed together and a joint account taken upon the three mortgages. The dues on the three mortgages are totally dissimilar and must be calculated separately. The first mortgage was executed by Jharkhun and Muhammad Latif jointly, the second was executed by Latif, and the third by the whole family. And in addition to this, the sums payable to the zamindar are not to be added to the sums due on the first and second mortgages but only to the sum due on the third mortgage. It is clear that there must be a re-making of the account. In re-making of that account we give the respondent leave to enter an appearance before the lower

1. (1907) 34 Cal 36.

2. (1907) 34 Cal 65.

Court, and make such representations with regard to the making of that account as he may be advised to make. The decree of this Court will be only for the taking of an account. It will be left to lower Court to proceed with the suit from that point. After making the account in accordance with the final decision of this case, the Court of the Subordinate Judge will direct that three months from the date of the completion of the account, the mortgaged property will be put up to sale, if the full amount due shall not have been paid. It is suggested by the learned vakil for the appellant, that inasmuch as Nijabut is the brother of Ebadut, therefore, the provisions of the last clause of S. 60, T. P. Act do not apply, and that in equity an order be made that Shillingford be allowed to redeem his own share in the mortgaged property without redeeming the whole mortgage. In this contention there does not seem to us to be any substance whatsoever.

The final point to be considered is what rights, titles and interests have been mortgaged by the deed of 15th October 1903. It is admitted that the right, title and interest of Najibun, that is a one-seventh share in the property, had been purchased by Shillingford on a date prior to the execution of the mortgage of 1903. Certainly the mortgagee has no lien on Shillingford's interest in that share. The interest of Fareed, as we have already stated, is exempt. Lastly we have to consider whether there is a lien on the interests of the three other sisters. On p. 22, of the paper-book, we read an endorsement by the Officiating Sub-Registrar who registered this document :

"The last four executants, namely, the daughters of Mt. Jharkhun, begged it to be noted that the signatures and marks had been obtained on blank paper on the clear understanding that no mention should be made in the papers of any previous transaction made by their mother and brother with the claimants."

In our view this was not an admission of execution. There having been no admission of execution, the Registrar had no jurisdiction to register the document. The document is, therefore to be regarded as unregistered. But in arriving at this conclusion, we are faced with the difficulty that in the case of *David Yule v. Ram Khelwan Sahai* (3), the Divisional

3. (1902) 6 O W N 329.

Bench of the Calcutta High Court held that

"the Sub-Registrar had jurisdiction to register the deed. There was no defect in his jurisdiction. When Baijnath Sahai admitted his signature to the deed, the Sub-Registrar was entitled to regard this as an admission of execution and accordingly rightly registered it. Further on the merits we do not believe that Baijnath was telling the truth when he said he merely signed his name on a blank sheet of paper. The plaintiffs have adduced abundant evidence to prove that the bond was written on the paper before Baijnath signed it."

We should have felt obliged to refer this matter to a Full Bench if the judgment had ended with the words,

"when Baij Nath Sahai admitted his signature to deed, the Sub-Registrar was entitled to regard this as an admission of execution and accordingly rightly registered it."

But the case was not decided solely upon that point; there was a definite finding of fact that Baijnath Sahai was not telling the truth when he said that he had signed his name on blank paper. In what terms he admitted his signature is not stated; from the judgment and from the head-note it appears that in addition to the signature was an endorsement in the executant's own handwriting :

"The mortgage-bond for Rs. 21,750 on account of hundis executed by me is correct."

We have it in the case before us now from the Registrar's endorsement itself, that there was a direct denial of execution of the document as drawn up. In our view, execution consists in signing a document written out and read over and understood, and does not consist of merely signing a name upon a blank sheet of paper. To be executed a document must be in existence; where there is no document in existence there cannot be execution. But this in the present case is not the whole point. Where an executant clearly says that he signed on blank paper and that the document which he had authorized is not the document which he contemplated, the statement is a denial not an admission of execution. The facts of the case of *David Yule v. Ram Khelwan Sahai* (3) are clearly distinguishable from those of the present case. The Registrar was required by S. 35, Cl. (3), to refuse to register the document as to the four ladies denying, and register it only as to the persons admitting execution. We must regard the document as registered only as regards Mt. Jharkhun and Muhammad Latif, and unregistered as to the other four ladies. It follows,

therefore that the interests which passed under the mortgage are the interests of Jharkhun and Latif only, that Shillingford as dar-patnidar has a right to redeem these interests, that if he fails to redeem those interests, the dar-patni which he has taken subsequent to the mortgage is voidable at the instance of the auction-purchaser. We note before concluding this judgment that the court-fee is Rs. 10. This fact was brought to our notice at the conclusion of the appeal; we should otherwise have refused to hear the learned vakil for the respondents until the proper court-fee had been paid. Inasmuch as the matter had been heard at some length before the fact was brought to our notice we allowed the hearing to continue, but we direct the Registrar to take measures to secure that no decree be drawn up in the respondent's favour upon his cross-appeal, until such court-fees as he, as taxing officer, may assess have been paid by the respondent upon his cross-appeal. If these fees are not paid within 15 days of the date of his assessment the appeal will stand dismissed with costs. If the court-fees are paid within time the cross-appeal will be decreed in part in accordance with this judgment, each side bearing his own costs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 210**

CHAMIER, C. J. AND JWALA PRASAD, J.

Ram Bahadur Singh and others—Defendants—Appellants.

v.

Ajodhya Singh—Plaintiff—Respondent.

Second Appeal No. 511 of 1914, Decided on 6th April 1916, against judgment and decree of Dist. Judge, Mozufferpore, D/- 2nd July 1914.

(a) *Transfer of Property Act (4 of 1882), S. 59—Per Chamier, J.—Witness who has witnessed execution must have subscribed as such—Scribe is not such witness*

Per Chamier, C. J.—A mortgage-deed is duly 'attested' within the meaning of S. 59, T. P. Act, when the attesting witnesses the execution of the deed and subscribes as an attesting witness.

[P 211 C 1]

The scribe of a document who was present at its execution and subscribed only as scribe, cannot be deemed to have attested the document.

[P 211 C 1]

Where, therefore, a mortgage-deed was signed by five persons who described themselves as attesting witnesses, but of whom only one witnessed its execution, and the scribe who signed as scribe was tendered to prove that he was pre-

sent from the beginning to the end of the transaction:

Held: that the mortgage was not proved: 35 Mad. 607, (P. C.) Rel. on. [P 211 C 1]

(b) *Transfer of Property Act (4 of 1882), S. 59—Per Jwala Prasad, J.—Attestation cannot be presumed—It must be proved—Evidence Act (1 of 1872), S. 114.*

Per Jwala Prasad, J.—There is no presumption that a scribe or a person describing himself as the attesting witness witnessed its execution. The fact must be established by evidence. [P 211 C 2]

*Atul Krishna Ray—for Appellants.**Lakshmi Narayan Singh—for Respondent.*

Chamier, C. J.—This appeal arises out of a suit brought by the respondent Ajodhya Singh upon a simple mortgage made by an ancestor of the appellants to secure the re-payment of Rs. 100 and interest thereon. The only defence with which we are now concerned is that the document is not proved to have been attested by two witnesses as required by S. 59, T. P. Act. The execution of the document purports to have been witnessed by five witnesses, who have signed their names as attesting witnesses in the margin in the usual place. In the right hand bottom corner of the document there is the signature of a man named Lalbihari who describes himself as katib tamassuk. It is contended that Lalbihari was an attesting witness. It has been found by both the Courts below that none of the persons who signed their names in the margin as attesting witnesses were present when the executant signed his name on the document except Gangotri Prasad, and unless it can be held that Lalbihari was an attesting witness the suit must be dismissed. The Court of first instance held that Lalbihari was not an attesting witness, but on appeal the District Judge observed that according to the evidence adduced by the plaintiff Lalbihari was present throughout the whole transaction from the drawing up of the bond up to the time when the parties went away. "If so," says the learned Judge:

"he was present when the bond was signed. Plaintiff does not say in so many words that Lalbihari actually witnessed the executant's signature, but his witness 2 does say so. I believe this evidence and I find that the scribe saw the bond signed."

What witness 2 said was that he and the persons whose names appear in the margin of the document and Lalbihari were present when the executant signed his name. The learned District Judge

appears to hold that as Lalbihari was present when the mortgagor signed the document and afterwards signed his own name on the document, he must be regarded as an attesting witness. As authority for this view he cites the cases of *Raj Narain Ghosh v. Abdur Rahim* (1) and *Dinamoyee Debi v. Bon Behari Kapur* (2), and he disagreed with the interpretation that was put upon those rulings by Griffin, J., and myself in the case of *Badri Prasad v. Abdul Karim* (3). The present case, no doubt, differs from the Allahabad case just mentioned, for in that case the scribe of the document wrote his name on the deed before the deed was signed by the executant. But we were of opinion in that case that an attesting witness within the meaning of S. 68, Evidence Act, 1872, was a witness who has seen the deed executed and who has signed the deed as a witness. I am of the same opinion now and I rest my decision on the judgment of their Lordships of the Privy Council in the matter of *Shamu Putter v. Abdul Kadir Rowthan* (4). In that case their Lordships quoted the decision in *Burdett v. Spilsbury* (5) with approval and in particular approved of the statement of the Lord Chancellor that a party who sees a will executed is in fact a witness to it and if he subscribes as a witness, he is then an attesting witness.

Their Lordships held that the word "attested" in S. 59, T. P. Act, the section with which we are concerned in the present case, was used in that sense. In the Allahabad case we said that although the scribe might have witnessed the execution of the deed in suit he did not sign the deed as a witness. The same remark may be made here. Lalbihari on the finding of the learned District Judge must be held to have seen the execution of the mortgage-deed, but it is evident that he did not sign the deed as a witness. I therefore, hold that Lalbihari is not an attesting witness within the meaning of S. 59, T. P. Act. In my judgment the Munsif was right in dismissing the suit. I would allow this appeal, set aside the order of the District Judge remanding the suit for

re-trial and dismiss the suit with costs in all three Courts.

Jwala Prasad, J.—The only point that arises in this appeal is whether the mortgage-bond in suit was duly attested by at least two witnesses as required by S. 59, T. P. Act. The bond bears the signatures of a number of persons as attesting witnesses to it and also the signature of Lalbihari Lal described therein as the scribe of the bond. Upon the evidence in the case the learned Munsif held that one only of the witnesses of the bond was present at the time of the execution thereof by the mortgagor. The learned District Judge held that the scribe was present throughout the whole transaction from the drawing up of the bond till the parties went away. From this he infers that the scribe was present when the bond was signed and he says that the plaintiff No. 2 deposed that the scribe actually witnessed the signature of the mortgagor. On looking into the evidence, I find that that witness does not say that the scribe witnessed the execution of the deed. The fact that Lalbihari Lal is described as katib tamassuk does not show that he did witness the execution. It often happens that the scribe of a deed does witness the execution and he may sign the deed because he has done so and yet describe himself as katib. In the present case there is no evidence that Lalbihari Lal did witness the execution of the deed and it cannot be presumed that he did. I agree with the order proposed by the learned Chief Justice.

By the Court.—The order of the Court is that the appeal is allowed, the order of the District Judge set aside and the suit is dismissed with costs.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 211

CHAMIER, C. J. AND JWALA PRASAD, J.
Sarjug Prasad Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 27 of 1916,
Decided on 6th April 1916, from order
of Sess. Judge, Muzaffarpur, D/- 21st
January 1916.

Criminal P. C. (1898), S. 250—Statement made at police inquiry is not a complaint within S. 250—Award of compensation not justified.

A statement made by a person at a police inquiry, which results in the institution of criminal proceedings against another, is not a "com-

1. (1901) 5 C W N 454.

2. (1903) 7 C W N 160.

3. (1913) 35 All 254=19 I C 250.

4. (1912) 35 Mad 607=16 I C 250=39 I A 218 (P C).

5. (1842) 10 Cl & F 340=59 R R 195.

plaint" made by him within the meaning of S. 250, Criminal P. C., when the case is not instituted either on his complaint or on information given by him but as a result of inquiry by the police. [P 212 C 1]

Rajendra Prasad—for Petitioner.

Judgment.—The petitioner in this case has been ordered under S. 250, Criminal P. C., to pay Rs. 300 to six accused persons as compensation for a frivolous and vexatious complaint made against them by him. The first point taken in support of this petition is that the case was not "instituted by complaint as defined in this Code or upon information given to a Police Officer or to a Magistrate" (S. 250, Criminal P. C.). It is not suggested by any one that the case was instituted on complaint, and on looking into the record we are not satisfied that the case was instituted upon information given by the petitioner to a police Officer or to a Magistrate. The facts appear to be that the petitioner was not at home at the time of the occurrence. On his way home he met three of his servants who had been injured. He went on to the village where the occurrence had taken place and that evening his statement was taken down by the police. He handed to the police a letter which he had received earlier in the day warning him that the other side were bent upon mischief. He gave the names, no doubt, of a number of persons supposed to have taken part in the affair, but the names were given not on his own knowledge but on information supplied to him by other persons. It appears to us that proceedings were instituted against the accused not upon the information given by the petitioner which was on the face of it worthless, but on evidence which was obtained by the police on an inquiry instituted by them. It is important to note that the police went to the village not because a riot had been reported, but because it had been reported that a riot was imminent. They arrived in the village too late and they at once set to work to inquire into the circumstances of the riot.

There is nothing before us to justify the conclusion that the institution of the proceedings against the accused persons was due to any action taken by the petitioner. In these circumstances he should not have been ordered to pay compensation under S. 250, Criminal P. C. We set aside the order. If the money has

been paid into the Court it must be refunded to the petitioner.

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Order set aside.

A. I. R. 1916 Patna 212

SHARFUDDIN AND ROE, JJ.

Madhur Sah—Plaintiff—Appellant.

v.

Thag Sah—Defendant—Respondent.

Second Appeal No. 1622 of 1915, Decided on 14th June 1916, from decision of Sub-Judge, Chapra, D/- 30th April 1915.

(a) Registration Act (1908), S. 49—Unregistered sale deed is inadmissible to prove contract of sale.

An unregistered sale-deed cannot be used in evidence of a contract which in itself affects property. [P 213 C 2]

(b) Specific Relief Act (1877), S. 27—Suit to register sale-deed and for declaration that subsequent sale is void and for possession falls under S. 27.

Plaintiff obtained an unregistered sale-deed of the property in dispute from defendant 1, who subsequently sold the same property to defendant 2 under a registered sale-deed. Plaintiff thereupon instituted a suit against both defendants asking (1) that defendant 1 should be ordered either to register the unregistered sale-deed, or to execute and register a second sale-deed, and (2) for a declaration that the transaction between defendant 2 and defendant 1 was null and void and for possession of the property:

Held: that the suit was one for specific performance under S. 27, Specific Relief Act: 8 I C 794, Ref. [P 213 C 1]

Harihar Prasad Singh—for Appellant.

Nirsu Narayan Sinha—for Respondent.

Judgment.—In this case the facts are, that the plaintiff obtained on 23rd July 1912, a deed of sale executed by defendant 1 and duly attested in respect of the property in suit. This document was not then and has not up to date been registered. On 13th August 1912, defendant 1 sold the same property to defendant 2 by a document duly registered. The plaintiff thereupon instituted a suit against both defendants, the relief asked for being, first, that defendant 1 should be required either to register the existing unregistered sale-deed or to execute and register a second sale-deed and against defendant 2 he asked for a declaration that the transaction between defendant 2 and defendant 1 was null and void by reason of the previous transaction with the plaintiff and should be so declared null and void and possession of the property delivered to the plaintiff. During the pendency of the suit defendant 1 compromised the case with the plaintiff and

executed and registered a fresh document as desired by the plaintiff. Defendant 2 continued to contest the suit. The lower Courts held that the suit as framed was not maintainable and concurred in dismissing the plaintiff's suit. Against these decisions a second appeal is laid in this Court. The judgment delivered by the lower appellate Court begins: "This was not a suit for the specific performance of a contract." I do not see how a suit for specific performance could have been framed otherwise than in the frame of the present suit. Under Ss. 27 (a) and 27 (b), Specific Relief Act, the plaintiff was entitled to a decree for specific performance as against defendant 1, and for possession as against defendant 2 if defendant 2 could have been shown to have had knowledge of the plaintiff's contract at the time when he entered into his own contract. Clearly it was a suit for specific performance.

The lower Courts seem to have converted it into a suit for the registration of documents and to have discussed only cases in which suits for the registration of a document were either maintained or dismissed. This case, in my opinion, is a perfectly simple one under the Specific Relief Act and must be remanded to the lower Courts for further consideration. There is now no question of any suit against defendant 1 for registration. That part of the suit has been compromised between the plaintiff and defendant 1. The original document remains unregistered. The registered document is dated subsequent to the document of defendant 2. The point in issue is very simple. Is the plaintiff's second document void by reason of the title of defendant 1 having passed by his sale to defendant 2? Or is defendant 2's title void by reason of an existing contract between the parties of which he was fully aware? The only point for consideration is, whether the unregistered document can be considered as evidence of this contract? Great stress has been laid upon the case of *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghose* (1) and the long line of case-law quoted therein. That case was a clean case under S. 27 (a), Specific Relief Act, and inasmuch as in a case of this description the contract itself does not affect the property until it has been reduced to writing and registered, it may be said that an unregistered deed may be used as evidence of that contract

as between the contracting parties, but I cannot take that decision to be authority for the proposition that in a case against third parties under S. 27 (b) an unregistered deed can be used in evidence, for it is clear that the existence of the previous contract is of vital importance in the case.

The contract itself is a transaction affecting property, and I hold that an unregistered sale-deed cannot be used in evidence of a contract which in itself affects property. The appeal is, therefore, decreed and the suit remanded for inquiry upon two issues by the lower appellate Court upon the evidence recorded by the Court of first instance. The first of these issues is: Was there a valid contract between the plaintiff and defendant 1 prior to the registered conveyance to defendant 2; and was defendant 2 aware of this prior contract? If either or both of these issues are decided in favour of the defendant the suit will be dismissed. If both issues are decided in favour of the plaintiff his suit will be decreed. In the decision of these issues the lower appellate Court will take heed that the unregistered deed is not to be used in evidence. If it appears that it is necessary to take further evidence on the question of the defendant's knowledge of the previous contract, the lower appellate Court is directed to remand the suit for the taking of such evidence. Costs to follow the result.

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Appeal decreed.

A. I. R. 1916 Patna 213

MULLICK AND ATKINSON, JJ.

Tajmulali—Defendant—Appellant.

v.

Jaga Mohan Das—Plff—Respondent.

Second Appeal No. 2106 of 1915, Decided on 24th July 1916, from decision of Sub-Judge, Cuttack, D/ 11th June 1915.

(a) **Hindu Law—Joint-family—Joint property—To convert self-acquired property into, intention to waive separate right must be established.**

To convert self-acquired property into joint property, a clear intention to waive the separate right of the owner must be established. Such intention will not be inferred from acts which may have been done out of kindness and affection. [P 214 C 2]

(b) **Hindu Law—Adoption—Mere tie of adoptive father and son is not sufficient to convert self-acquired property into joint property.**

The mere tie of adoptive father and son is not sufficient to show an intention to convert self-

acquired property into joint property: 22 *Mad.* 383 (P. C.) *Ref.* [P 214 C 2]

The mere fact that a Hindu and his adopted son lived together and the latter assisted the former in working his self-acquired property, is not sufficient to show an intention on the part of the father as owner of his self acquired property to throw it into the common stock for the benefit of both himself and his adopted child, so as to make the property joint property. [P 215 C 1]

Suresh Chandra Chakravarty and *S. C. Basak*—for Appellant.

M. S. Das—for Respondent.

Atkinson, J.—The plaintiff, who is the adopted son of defendant 5, brings this action for a declaration that he is entitled to the extent of eight annas interest in the properties Nos. 1, 2, 3, 4, 5 and 6 jointly with the defendant, who is entitled to the other eight annas of the said property. The plaintiff's case as made by his pleading is to the effect, set forth in paras. 3, 4 and 5 of the plaint, that the property in suit was the ancestral property of Hari Das, more particularly as to Nos. 4 and 5, and that the other properties sprang out of the income or accumulations of the ancestral property and so themselves became joint property and; as the plaintiff was the adopted son of the defendant 5 and the properties Nos. 1, 2, 3, 4, 5 and 6 were ancestral property, he the plaintiff, was entitled to share jointly with his adoptive father in all these properties. Matters were brought to a head by the disposal of certain of these properties by the defendant 5. He disposed of the property No. 1 by one deed, Nos. 2 and 3 by a second deed, and a third deed disposed of the properties Nos. 4, 5 and 6 to the other defendants. These deeds were dated 3rd March 1913. Now, the learned Officiating Munsif found in favour of the plaintiff on the question of adoption, but against the plaintiff as to the properties in suit being ancestral property. The Munsif held that the properties in suit were self-acquired properties of defendant 5.

From that decision there was an appeal and the case was tried by the Subordinate Judge. On the appeal the plaintiff made a case essentially different and distinct from the case he had made before the Munsif. His case on appeal was first that he tried to establish that the property was ancestral, but clearly the learned Judge disbelieved it, and found that he had not established the case which he sought to make by his pleading. He, the plaintiff, then attempted

to establish a different case, namely that all the properties in suit were the self-acquired property of defendant 5 and that by the course of events and the relationship of the parties the properties in question had become the joint family property of the plaintiff and defendant 5. The learned Judge, in our view, altogether lost sight of the essential principles which should have guided him in coming to a right determination on the facts of this case. He says:

"the evidence on the plaintiff's side is to the effect that all these properties used to be managed by the plaintiff for several years. In the absence of any evidence to show that the plaintiff did so exclusively for defendant 5, it is only natural to infer that he did it for both."

We think that that conclusion was a complete error in law on the part of the learned Judge, and that he could not draw any such inference from such facts to warrant the conclusion that it was intended thereby that the self-acquired property of defendant 5 should, by reason of the facts stated, have become the joint property of the plaintiff and defendant 5. He further says:

"no doubt a clear intention to waive the separate rights of the owner is to be established; but considering that the parties are father and son and that the defendant 5 had no other tie up to that time, such an intention is to be inferred from the manner in which the properties were treated."

We likewise consider that that was a complete misconception of what the law is. The law seems to be clearly summarized in Mr. Mayne's book at p. 356 when he says:

"to create such a title by way of joint property or to convert self-acquired property, into joint property a clear intention to waive the separate right of the owner must be established and will not be inferred from acts which may have been done out of kindness and affection."

The mere tie of adoptive father and son is not sufficient to show an intention to convert self-acquired property, into joint property and that view is strongly supported by the leading case of *Sri Rama Krishna Rao v. Court of Wards* (1). At p. 390 their Lordships of the Privy Council state (and in that case the Raja had declared that he wished to constitute his adopted son his heir) that

"There is nothing about the Raja not exercising any power which he might have by law of making a will. Saying he had constituted the appellant heir to his property means only that he had given him the same right of inheritance as a natural son would have. Mr. Mayne's argument, if their Lordships rightly understood it

that there was an implied contract not to make a will, the consideration for it being the giving of the son by natural father, is a novel one and without any authority to support it. If it were right an adopted son would be in a higher position than a natural son."

In this case all that can be said in favour of the plaintiff is that he lived with his adoptive father and that he assisted him in working the property. But these acts do not warrant, nor are they in themselves sufficient to show, an intention on the part of defendant 5 as owner of his self-acquired property to throw it into the common stock for the benefit of both himself and his adopted child so as to make the property joint property. There was no evidence to support the plaintiff's alternative case, and as he failed conspicuously in both Courts on his original case, we see no necessity to send it back for any fresh form of trial. We think that the justice of the case will be sufficiently met by following the appeal and dismissing the suit with costs in all Courts.

Mullick, J.—I agree.

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Appeal allowed.

A. I. R. 1916 Patna 215

ROE AND JWALA PRASAD, JJ.

Hira Pandey and others—Principal Defendants—Appellants.

v.

Bachu Pandey—and *others*—Plaintiff and Pro forma Defendants—Respondents.

Second appeal No. 1342 of 1910, Decided on 25th May 1916, from decision of Sub. Judge, Bankipore, D/- 9th December 1909.

(a) Civil P. C. (5 of 1908), S. 9—Suit to establish right to hold certain office maintainable—Legal character—Specific Relief Act (1 of 1877), S. 42.

The right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character, and a suit to establish such a right is maintainable under S. 9, Civil P. C. [P 215 C 2]

(b) Specific Relief Act (1 of 1877), S. 42—Suit to establish right of priest to perform ceremonies within certain birt not maintainable.

No right vests in any priest to claim to go to the house of a disciple, even when not called for by him, for performance of religious ceremonies there, and a suit does not lie for a declaration that the plaintiff is entitled to perform all funeral ceremonies within a certain 'birt'.

[P 216 C 1]

(c) Civil P. C. (5 of 1908), S. 9—Suit for recovery of voluntary offering—Suit based on custom not maintainable.

No suit lies for the recovery of a voluntary

offering if that suit is based on custom. 2 W. R. 69, *Foll*; 20 *All.* 234, *Ref.* [P 216 1]

A suit by one priest for recovery of offerings made to another, on the ground that the latter unlawfully performed ceremonies within the former's birt, is not maintainable in the absence of an express contract whereby the defendant undertook to make refund to the plaintiff.

[P 216 C 2]

Lal Mohan Ganguly—for Appellants.

Lachmi Narain Singh—for Respondents.

Judgment.—This suit is by a priest of the town of Banikpore, alleging that he has by custom a right to officiate at all funeral ceremonies performed upon the bank of the Ganges between certain definite points. The plaint further sets forth, that the principal defendants in the case, in contravention of this custom, entered the house of one Durgan Sahu within the 'birt' of the plaintiff, and received from his household the sum of Rs. 49-7-6, that by old established custom based upon a will made 300 years ago, any priest entering upon the 'birt' of another is bound to refund any sums realised from disciples living in that 'birt'. The relief sought for in the plaint is, therefore, (1) for a declaration of the plaintiff's 'Mahapatri birt jujmanka', (2) that the boundaries thereof be declared, (3) that it be declared that Durgan Sahu's house lies within those boundaries, (4) that Rs. 49-7-6 be recovered from the defendant No. 1, and (5) that a permanent injunction be issued against defendant No. 1 from trespassing upon the plaintiff's 'birt'. Before dealing with the facts found by the learned Subordinate Judge in appeal, it is necessary to set down the terms of S. 42, Specific Relief Act:

"Any person entitled to any legal character, or to any right as to any property may institute, a suit et cetera. And S. 9, Civil P. C. sets out:

"A suit in which the right to property or to office is contested, is a suit of a civil nature, notwithstanding that such right may depend entirely upon the decision of questions as to religious rights or ceremonies."

It is not necessary to go deeply into the whole history of case-law with regard to suits for succession to offices in or about temples. It has been decided that such suits are maintainable, for the reason that the right to hold a certain office in a certain place at a certain season of the year confers upon the holder of the right a legal character. On the other hand, it has been held definitely

that the right to go into the house of a disciple when called for by him or to enter upon it as of right though not called for, does not create any legal character, and that no suit for a declaration of such a right is maintainable. The words in the two sections are "legal character or the right to an office." We are unable to see that in the case set forth in the plaint there vests in the plaintiff any legal character or any right to any office. Obviously the freedom of the subject entitles all Hindus to call in at any time their own particular priest, or any priest whom they may themselves prefer, to perform any office; and so long as that inherent freedom exists, there can vest in no one any legal character or any right to the office of performing ceremonies in private houses. Therefore, no suit for a declaration of any such right will lie. It remains only to consider whether the plaintiff is entitled to a decree for Rs. 49-7-6. We are agreed that he is not entitled to a decree, unless he can prove that there was a contract between himself and defendant 1, whereby that defendant has bound himself to pay to the plaintiff all sums received from ceremonies performed within the plaintiff's 'birt.' The question therefore, turns upon the issue of fact, what is the nature of the plaintiffs' claim? and is it a claim upon a contract or is it a claim upon a custom? The learned Subordinate Judge finds, and his finding of a fact is final, that

"the fact that this right is enjoyed in this city by different Mahapatra Brahmins in different localities, goes clearly to imply a sort of contract that they should not interfere with the rights of each other, and if the same right is proved both by oral and documentary evidence to have been in existence for a long time, I think the alleged usage and custom has also been made out."

Therefore, the plaintiffs' suit has been decreed in the lower Court upon usage and custom and a sort of contract between third parties. It is clear that defendant 1 cannot be bound by any contract made by a third party, and it is clear that there is on the record no evidence of any specific contract made by himself. We hold that the decision in *Muddun Mohun Ghosal v. Muboram Chuckerbutty* (1) is good authority, which has not been dissented from, that no suit will lie for recovery of a voluntary offer-

ing, if that suit is based upon custom. And we are not shaken in this view by the fact that in the case of *Oochi v. Ulfat* (2) a suit for the recovery of such offerings was held maintainable, on the ground that it was based upon a definite contract. The learned Munsif in his judgment has shown that all previous occasions in which suits were instituted against defendants in the city of Patna, the suits were decreed on the basis of contract and not on the basis of custom. We are of opinion that the suit should be dismissed entirely. It is now dismissed with costs in all Courts. The appeal is decreed with costs.

V.S./R.K.

Appeal allowed.

2. (1893) 20 All 234.

A. I. R. 1916 Patna 216

Full Bench

CHAMIER, C. J. AND SHARFUDDIN AND ATKINSON, JJ.

Abdul Gani—Judgment-debtor—Appellant.

v.

Raja Ram and others—Decree-holders—Respondents.

First Appeal No. 384 of 1914, Decided on 4th May 1916, from order of Sub-Judge, Mozaffarpore, D/-6th June 1914.

Civil P. C. (5 of 1908), O. 21, R. 95—Order delivering possession to decree-holder auction-purchaser is not appealable.

No appeal lies against an order under O. 21, R. 95, delivering possession to the decree-holder auction-purchaser. [P 218 C 1]

Mohomed Mustafa Khan and Kailaspati—for Appellant.

Dwarka Nath Mitter, Sailendra Nath Palit and Baikuntha Nath Mitter—for Respondents.

Chamier, C. J.—Madhab Prasad father of the respondents obtained a decree for money against the appellant, in execution of which he caused certain property of the appellant to be sold. By leave of the Court he purchased it himself. He succeeded in obtaining possession of part of the property, but in respect of the remainder he was obstructed by the appellant who contended that it was not part of the property sold. Madhab Prasad died soon afterwards and his sons, the present respondents, applied to the Court under O. 21, R. 95, to place them in possession of the disputed property. The Court allowed the application. Hence this appeal. The respondents contend that no appeal lies. The question

1. (1865) 2 W R 69.

thus raised is one on which there has been much conflict of judicial opinion during the last 30 years or more. Some Judges have taken the view that an order under S. 318, Civil P. C., 1882, or O. 21, R. 95, of the present Code disposes of a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of S. 244 of the Code of 1882, or S. 47 of the present Code, and that where the question "arises between the judgment-debtor and an auction-purchaser, who was originally plaintiff in the suit, it is a question arising between the parties to the suit" within the meaning of S. 244 of the Code, of 1882, or S. 47 of the present Code, and the decision is consequently a decree within the meaning of S. 2 of either Code and is appealable as such. Other Judges have held that an appeal does not lie, either because the question is not one "relating to the execution, discharge or satisfaction of the decree" or because the question does not arise between the judgment-debtor and the decree-holder as such but between the judgment-debtor and the auction-purchaser as such.

In the Allahabad High Court after many conflicting decisions the question was referred to a Full Bench of five Judges with the result that three Judges held that an appeal did not lie, and the Chief Justice and Knox, J., held that an appeal did lie: *Mt. Bhagwati v. Banwari Lal* (1). In the Bombay High Court it has been held that an appeal does lie: *Sadashiv Mahadu Dhole v. Narayan Vithal Mawal* (2). In the Madras High Court it is now settled by a long course of decisions that an appeal does lie in such a case, but in two cases the Judges have expressed great doubt as to the correctness of those decisions: see *Kattayat Pathumayi v. Raman Menon* (3) and *Sandhu Taraganar v. Hussain Sahib* (4). In the Calcutta High Court it has been held in three cases that an appeal does lie in such a case [see *Madhusudan Das v. Gobinda Pria Chowdhurani* (5) decided without reference to the reported case on the subject, *Ram Narain Sahoo v. Bandi Pershad* (6) and *Hari Charan*

Dutt v. Mon Mohan Nandy (7)]. The case of *Sariatoola Molla v. Raj Kumar Roy* (8), which was referred to, deals with a different question but language was used in the judgment which supports the view that an appeal does lie in such a case. In the same Court it has been held in seven cases, either expressly or impliedly, that an appeal does not lie [see *Seru Mohun Bania v. Bhagoban Din Pandey* (9); *Iswar Pershad Gurgov. Jai Narain Giri* (10); *Appeal No. 207 of 1884 decided on 20th July 1885*, unreported; *Kishori Mchun Roy Chowdhry v. Chunder Nath Pal* (11); *Bhimal Das v. Mt. Ganesha Koer* (12); *Mahomed Mosraf v. Habil Mia* (13) and *Sasibhusan Mookerjee v. Radhanath Bose* (14), where all the authorities are reviewed, and the decision in *Bhimal Das v. Mt. Ganesha Koer* (12) has been expressly approved in *Bujha Roy v. Ram Kumar Pershad* (15) and *Jagarnath Marwari v. Kartick Nath Pandey* (16)].

Much stress was laid upon the decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (17), but that case in no way affects the question which we have to decide and an order of the kind there in question is under the present Code of Civil Procedure appealable as an order and not a decree [see O. 21, R. 90 and O. 43, R. 1 (j)]. Nor does the decision in *Manickka Odayan v. Raja Gopala Pillai* (18), which has been cited, affect the present question, for that was a case under S. 310-A, of the Code of 1882. The question whether an appeal lies against an order under that section or O. 21, R. 89, of the present Code depends upon other considerations [see *Mohomed Akbar Zaman Khan v. Sakhdeo Pande* (19)]. I am strongly of opinion that this Court should not without very good reason depart from a long course of decisions in Calcutta High Court. I consider that the cases which I have referred to show

1. (1875-78) 31 All 82=1 I C 416.
2. (1911) 35 Bom 452=11 I C 987.
3. (1903) 26 Mad 740.
4. (1905) 28 Mad 87.
5. (1902) 27 Cal 34.
6. (1906) 31 Cal 737.

7. A I R 1914 Cal 302=20 I C 874.
8. (1900) 27 Cal 709.
9. (1883) 9 Cal 602.
10. (1886) 12 Cal 169.
11. (1887) 14 Cal 644.
12. (1897) 1 C W N 658.
13. (1907) 6 C L J 749.
14. A I R 1915 Cal 137=25 I C 267.
15. (1899) 26 Cal 529.
16. (1908) 7 C L J 436.
17. (1992) 19 Cal 683=19 I A 166 (P C).
18. (1907) 30 Mad 507.
19. (1911) 10 I C 51.

that the balance of opinion in the Calcutta Court has been since 1883 so strongly in favour of the view that an appeal does not lie in such a case, that we ought to follow it as if it were a settled *curia*. To do otherwise would cause great and unnecessary confusion. I would accordingly dismiss this appeal but under the circumstances make no order as to costs.

Sharfuddin, J.—I agree.

Atkinson, J.—I agree.

By the Court.—The order of the Court is that the appeal is dismissed. There will be no order as to costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 218

ROE AND JWALA PRASAD, JJ.

Bapu Lal Barik Gayawal—Defendant—Appellant.

v.

Harihar Pandit—Plaintiff—Respondent.

Second Appeal No. 1406 of 1915, Decided on 26th July 1916, from decision of Dist. Judge, Gaya, D/- 20th February 1915.

(a) Contract Act (1872), Ss. 23 and 29—Agreement to share earnings from certain ceremonies is neither opposed to public policy nor uncertain and can be enforced.

Defendant, a gayawal, agreed with plaintiff, an acharjya, that if the former performed certain ceremonies without calling in the latter to assist he would pay the latter a certain share of his earnings from the performance of those ceremonies :

Held : that the agreement was neither opposed to public policy nor void for uncertainty and was enforceable at the instance of the plaintiff : 9 M I A 344 (P C) and 15 W R 531, Ref; 26 Cal 355; 10 W R 457 and 20 Cal 470, Dist. [P 219 C 1]

(b) Contract—Two contracts made on same day—Presumption of connexion exists.

Where two contracts are made on the same day it may be presumed that there is some connexion between them. [P 219 C 2]

Naresh Chandra Sinha—for Appellant.

Ram Prasad—for Respondent.

Judgment.—The plaintiff in these cases was an acharjya. The defendant was a Gayawal. A Gayawal ordinarily receives the first visit from pilgrims to Gaya and advises them as to the ceremonies to be performed. In the case of important personages the garawal might perform these ceremonies himself but for common folk he would deem an acharjya sufficiently holy, and would recommend an acharjya to the pilgrims. On 28th

April 1888 Bapu Gayawal defendant was indebted to Harihar Pandit acharjya, plaintiff, in the sum of Rs. 2,100 and executed a bond for the liquidation of this debt by 42 annual instalments of Rs. 50 each running from the 3rd Chaith 1296 to the 3rd Chaith 1337. On the same date Bapu Gayawal executed another document whereby he undertook to put in charge of Harihar Pandit, for performing their pinda shrad as an acharjya, all persons who would come to him as pilgrims from districts specified in the agreement, and for levying from such pilgrims certain fees fixed in the agreement. The bond further set forth that of the rates levied Harihar Pandit undertook to credit 25 per cent. to the Gayawal. There was penalty attaching to this bond :

“ If it should come to light that the pilgrims were made over to the other acharjyas I will be held liable for all claims made by the said Harihar Pandit : and I bind myself to Harihar Pandit to refund all moneys coming into my hands on account of acharjya's fees.”

In addition to this debt of Rs. 2,100 the Gayawal owed the acharjya Rs. 500 on a registered bond dated 3rd May 1886. This debt after deduction of interest paid from time to time to the Pandit, stood on 12th July 1899 at Rs. 937-13-6. In order to avoid being sued in Court for this sum the Gayawal executed a new bond for Rs. 937-13-6 to bear interest at 1 per cent. per mensem. On the same date (12th July 1899) the Gayawal entered into an agreement similar to the agreement of 28th April 1888 with regard to the pilgrims from districts not specified in the 1888 agreement. The only difference in terms of the two bonds is, that in the 1888 bond the Gayawal takes 25 per cent. of the fees, whereas by the bond of 1899 the Gayawal resigns all claims to any share in these fees. In the 1899 bond it is also distinctly stated that the Gayawal will refund all sums on account of acharjya's fees which might find their way into his hands. The terms of these two agreements were observed up to the 12th Bhado 1318. For his dues from the 12th Bhado 1318 to the 11th Kartik 1319 the plaintiff went to the Small Cause Court and obtained and executed an ex parte decree against defendant. He now brings this suit for recovery of his dues up to the date of his suit. The District Court in appeal has given him a decree for Rs. 59-11-0. Against this decree the

defendant appeals; and cross-objections by the plaintiff are filed.

Two arguments only have been advanced at the Bar in support of the appeal: (i) That the suits are not maintainable. (ii) That there was for the second contract no consideration. The question whether the suits are maintainable or not depends upon the question whether the contract was a valid contract and that question depends not upon the Transfer of Property Act but upon the Contract Act. The agreements do not purport to transfer any property. They promise to do certain series of acts and to accept certain consequences if such acts are not performed. It may be that an uncertain right to receive future offerings is not transferable. That is immaterial. We are dealing with a contract to refund fees wrongly realised upon a property, not a transfer of the property itself. There is no substance in the suggestion that the contract is void for uncertainty. The subject-matter of the contract is clearly defined. Its value may be unknown but that is immaterial. Nor upon the case-law can it be said that the contract is opposed to public policy. Personal feelings might lead a deeply religious man to declare that any contract tending to result in pressure upon pilgrims to select particular celebrant must be immoral, but case-law makes it clear that the privileges of priests are capable of alienation and delegation [*Ramasawmy Aiyar v. Venkata Achari* (1)] and that though no one can compel another to employ a particular priest against his will, a suit will lie against a priest if the suit is brought on the ground that he is bound by contract to give the plaintiff a certain share of his earnings [*Mugjoo Pandean v. Ram Dyal Tewaree* (2)].

We have in the case before us a definite contract by which Babu Gayawal undertakes that if he performs any ceremonies without calling in Harihar Acharjya to assist, he will pay to Harihar Acharjya in one set of circumstances three-fourths and in another the whole of his (Babu Gayawal's) earnings from the performances of those ceremonies. We can see no substance in the suggestion that the contracts are void. *Kashi Chandra Chuckerbutty v. Kailash Chan-*

1. (1861-63) 9 M I A 344=2 W R 21 (P O).

2. (1871) 15 W R 531=8 B L R 50.

dra Bandopadhyaya (3) [based on *Ramessur Mookerjee v. Ishan Chunder Mookerjee* (4)] and *Shoilojanund Ojha v. Peary Charan* (5) are not in point: there was in those cases no contract. The second ground taken is equally untenable. Where two contracts are made on the same day it may without impropriety be presumed that there is between the two contracts some connexion. Upon a presumption of this nature the learned Judge has found as a fact that the second contract was not without consideration. The appeals are dismissed with costs. The cross-objection is precluded by findings of fact and is dismissed.

V.S./R.K.

Appeals dismissed.

3. (1899) 26 Cal 256.

4. (1868) 10 W R 457.

5. (1902) 29 Cal 470.

A. I. R. 1916 Patna 219

CHAMIER, C. J. AND JWALA PRASAD, J.
Gajanand Thakur and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 11 of 1916, Decided on 3rd April 1916, from order of Sess. Judge, Monghyr, D/- 22nd February 1916.

Criminal P. C. (5 of 1898), Ss. 423, 428 and 537—Case remanded by Sessions Judge on appeal for retrial with direction to record additional evidence and give fresh decision—Additional evidence recorded—Conviction—Appeal—Additional evidence discarded at request of parties—Conviction confirmed on original evidence—Illegality—Retrial held not necessary—Accused held not prejudiced.

On appeal against a conviction by a Subdivisional Magistrate under Ss. 147 and 148, I. P. C., a Sessions Judge set aside the conviction and sentence and ordered a re-trial, with a direction that the Magistrate should take further evidence and should record a fresh decision on the evidence already recorded and also on the additional evidence. After remand the Magistrate recorded additional evidence but after considering the entire evidence on the record again convicted the accused and passed the same sentence as before. On appeal against the second conviction by the Magistrate, the Sessions Judge, at the request of both parties, discarded the additional evidence but confirmed the conviction on the evidence originally recorded:

Held: Per Chamier, C. J.—That it was not necessary for the High Court to order a re-trial by the Magistrate even if the order of the Sessions Judge was not merely irregular but illegal. Ordinarily the proper course to take would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the

evidence originally recorded or send the case to another Sessions Judge for that purpose, but as both sides had asked the Sessions Judge to disregard entirely all the additional evidence and the Sessions Judge had already recorded his findings on the original evidence only, it was unnecessary to return the case to the Sessions Judge in order that he might record a fresh judgment. [P 221 C 1]

Per Jwala Prasad, J.—The first order of the Sessions Judge, in appeal, setting aside the convictions and sentences, ordering a re-trial of the accused, and directing the Magistrate to take additional evidence but at the same time requiring him to record a fresh decision on evidence already on the record of the case and upon the additional evidence which he was directed to take, was wholly illegal; but as the accused had not been prejudiced in any way by such order, a re-trial was, under the circumstances of the case, not necessary. 3 C, L. J. 303, *Ref.*

[P 221 C 2, P 222 C 1]

Hasan Imam, K. P. Jayawal and Abani Bhusan Mukerji—for Appellants.
S. Ahmad—for the Crown.

Chamier, C. J.—These are applications for revision of an order of the Sessions Judge of Purnea confirming a conviction recorded by the Subdivisional Magistrate of Araria. The applicants after a lengthy trial were convicted by the Subdivisional Magistrate on 27th March 1915 of offences under Ss. 147 and 148, I. P. C. The first applicant Gajanand Thakur was sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 1,000 or, in default, to undergo rigorous imprisonment for six months more. The applicant Badri was sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 200 or, in default, to undergo rigorous imprisonment for six months more. The remaining four applicants were sentenced to eight months' rigorous imprisonment apiece. On appeal to the Sessions Judge it was contended that the Magistrate had omitted to record important evidence for the prosecution. The Sessions Judge accepted this contention and, thinking that it was not desirable that the Sessions Court should decide the case without having the advantage of the opinion of the Magistrate on the evidence as a whole, he directed that the Magistrate should record a fresh decision on the evidence already on record and on the additional evidence which he, the Sessions Judge, directed him to record. The Sessions Judge ordered what he called a "re-trial from the point at which the additional evidence should have been taken." He set aside the convictions and sentences,

remanded the case to the Magistrate and directed him to take additional evidence for the prosecution and any additional evidence that the accused might tender, and he said that the evidence, oral and documentary, already on the record should be treated as evidence at the re-trial. On the case being returned to the Magistrate 13 more witnesses were examined for the prosecution and 25 for the defence, and the Magistrate recorded a fresh judgment arriving at practically the same conclusions as at the first trial and imposing the same sentences less the periods of imprisonment already undergone by some of the accused.

Again there was an appeal to the Court of Session. This time the appeal came before a different Sessions Judge. After a careful examination of the evidence the learned Judge came to the conclusion that the convictions were warranted by the evidence and he declined to interfere with the sentences. All the persons convicted have applied to this Court in revision. The first point taken on their behalf is that the order of the Sessions Judge, setting aside the conviction, ordering fresh evidence to be taken, and requiring the Magistrate to decide the case on the evidence already on the record and on the additional evidence, was illegal and was calculated to prejudice the accused persons seriously. The order of the Sessions Judge is a curious mixture of an order setting aside a conviction and directing further inquiry under S. 423, and an order directing a Subordinate Court to take additional evidence under S. 428. As the case went back to the Magistrate who had recorded the evidence in the first instance, the irregularity, or, as the accused contend, the illegality in the Sessions Judge's order could hardly have prejudiced the accused. In the events which happened it is certain that the accused were not prejudiced, for when the case came before the Sessions Judge the second time it was conceded on all hands that the additional evidence was of no value whatever, and both the prosecution and the defence asked the Sessions Judge to try the case on the evidence originally recorded, and this was done. As already explained, it was urged before us that the order of the Sessions Judge was illegal and we were invited to set it aside and order a fresh trial by the Magistrate. It seemed to me that this

Court was not called upon to order a re-trial by the Magistrate, even if it was of opinion that the order of the Sessions Judge was not merely irregular but illegal. Ordinarily the proper course to take would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the evidence originally recorded or send the case to another Sessions Judge for that purpose, but as both sides had asked the Sessions Judge to disregard entirely all the additional evidence and the Sessions Judge had already recorded his findings on the original evidence only, it seemed to me unnecessary to return the case to the Sessions Judge in order that he might record a fresh judgment. As, however, it was strenuously urged before us that the accused had been prejudiced we decided to look into the evidence for ourselves and we put the case off till to-day in order that counsel might have time to do the same. To-day counsel for the accused elected to address us only on the question of sentence. I was satisfied before, and I am still more satisfied now, that the accused were in no way prejudiced by the failure of the first Sessions Judge to make an order in strict compliance either under S. 423 or under S. 428, Criminal P. C. It only remains to consider whether there is any ground for interference with the sentence which have been imposed.

The case for the prosecution, which has been found to be true, has already been stated not less than four times, and it is unnecessary to set it out here at any length. It is sufficient to say that the case arose out of a family dispute between a widow named Janakbati and her husband's nephew, Gajanand Thakur, who is the first applicant here. It has been proved that on 6th January 1915, a large body of men headed by Gajanand Thakur and his relative Badri, who were both riding on an elephant, and both of whom carried a gun, went to the Maina Kamat where Janakbati was living. Janakbati had anticipated trouble and she had retained a number of men for her own protection. Gajanand ordered Janakbati's men to leave the Kamat, but his orders were not obeyed. Gajanand thereupon ordered his men to assault them and both Gajanand and Badri fired off their guns. Some of Janakbati's men were hit with

lathis and brickbats and others were hit with shot. It is quite clear that Gajanand and his party anticipated considerable resistance and that they went to the place in question determined to override any opposition that might be offered. Counsel for Gajanand, in pleading for a reduction of the sentence on his client, said that Gajanand was a man of good social position and he impressed on us the fact that imprisonment means much more for a man of Gajanand's position than it does for men in the position of the other applicants. This is no doubt true, but, on the other hand the offence committed by Gajanand is a very serious one and might easily have resulted in the loss of several lives. It is commonly argued in cases of this kind that a man for whose benefit a riot is committed does not himself take part in it. In the present case it is proved beyond doubt that Gajanand actually took part in the riot and himself used violence. He cannot complain if he is treated in the same way as his servants and followers. In view of the facts which have been proved in the present case I think it would be wrong for this Court to interfere with the sentence. I would dismiss these applications.

Jwala Prasad, J.—I agree in maintaining the convictions of the applicants and also the sentences passed on them. It appears to me that the order of the Sessions Judge dated 6th May 1915, setting aside the convictions and sentences, ordering re-trial of the accused, and directing the Magistrate to take additional evidence, but at the same time requiring him to record a fresh decision on evidence already on the record of the case and upon the additional evidence which he was directed to take, was wholly illegal. In *Mir Sarwarjan v. King-Emperor* (1) an exactly similar order passed by the Sessions Judge of Bakarganj, in appeal, setting aside the finding and sentence, remanding the case to the Magistrate for taking additional evidence and for recording his judgment on the whole evidence that was previously on the record and on the additional evidence taken, was set aside by the High Court and the case was remanded to the Magistrate for re-trial. In the present case it is clear that the accused have not in any way been prejudiced by the order complained

1. (1906) 3 C L J 303.

of for the case has been decided on the evidence originally recorded. Under the circumstances, a re-trial by the Magistrate is not necessary. We might have set aside all the proceedings subsequent to the first order of the Sessions Judge and called upon some other Sessions Judge to hear the appeal against Magistrate's order, but even that seemed to be unnecessary, as the Sessions Judge who heard the case after the remand put out of consideration all the additional evidence taken. We gave counsel an opportunity of addressing us on the evidence, but he elected to address us only on the question of sentence. I agree with the order proposed by the learned Chief Justice.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 222

CHAPMAN AND ATKINSON, JJ.

Darpan Koer—Plaintiffs—Appellants.
v.

Kedar Nath and another—Defendants
—Respondents.

Second Appeal No. 1500 of 1913, Decided on 10th April 1916, from decision of Dist. Judge, Patna, D/- 20th February 1913.

Vendor and Purchaser—Sale of land—Vendor bound to put vendee in physical possession of property sold.

A vendor of land, when he holds himself out in that capacity, is bound to know and ascertain if in fact the subject-matter of what he is selling exists, and he must be in a position to give possession of the physical thing which he has contracted to sell. The obligation is upon the vendor to give the vendee possession; and not upon the latter to go and get possession for himself, specially when any difficulty arises in identifying the particular land sold [P 222 C 2 P 223 C 1]

Kulwant Sahai—for Appellant.

Atkinson, J.—This is an action brought by a lady, Mt. Darpan Koer, as plaintiff, against Kedar Nath, defendant 1, and defendant 2, a gentleman called Munshi Jai Behari Lal, and the action claims a declaration for possession of a certain plot of land purchased by the plaintiff from defendant 1, or, in the alternative, for a declaration that the purchase-money which has been paid, stated to be Rs. 800 may be refunded with interest. Defendant 2 is only concerned in this case as being a Mukhtear or agent. He negotiated the sale of this plot of land between the plaintiff and defendant 1. Defendant 1 seems to have purchased at a revenue sale on 6th June 1907 a plot of

land marked on the Revenue Registration Roll dated 1840, which is alleged to be the plot in question. He never seems to have examined or enquired either before or after the purchase which he made, whether or not what he had brought did in fact exist and corresponded with the plot marked on the map of 1840. He procures the sale certificate of 20th of May 1908 and re-sells to the plaintiff on 15th of August 1908 what he had purchased by his sale certificate on 20th of May 1908 and apparently between these two dates, in May and August, he made no attempt to ascertain the existence of the subject-matter of the property which he then was reselling as vendor. The plaintiff paid as the purchase-money of this plot Rs. 500, defendant 1 got the Rs. 500, executed a conveyance, and purports to recite in it that he is in possession of the property which he is conveying to the plaintiff and of which she is thereafter to be put in possession. The plaintiff, during the negotiations for the sale, makes no enquiry and takes no steps to ascertain whether or not the property in fact exists. Having paid her money, and having got her conveyance, she proceeds to take the necessary steps to have herself registered with the Revenue Authorities and having gone a certain distance in that procedure, she discovers then for the first time that the valuable property which she has purchased from defendant 1 is not in existence and cannot be physically traced, nor can physical possession be given of the same to her. Defendant 1 says,

"What I sold to the plaintiff was the sale certificate and whatever rights I had in the plot of land given me by that document."

In my opinion a vendor of land, when he holds himself out in that capacity, is bound to know and ascertain if, in fact, the subjects matter of what he is selling exists, and he must be in a position to give possession of the physical thing which he has contracted to sell. In this case defendant 1 neither knew nor cared whether the property was there or not and the District Judge so finds. The plaintiff did not herself enquire as to whether the property was such as she could acquire physical possession of: but up to the present time she has not got the property and she cannot be put in possession of it because defendant 1 will take no steps to put her into possession

even if the property exists. The obligation is upon defendant 1 to give the plaintiff possession; and not upon the plaintiff to go and get possession for herself, especially when any difficulty arises in identifying the particular land sold. We cannot, therefore, concur in the views of the learned District Judge who decided this case on appeal, when he says that the plaintiff in the distant future may, if she is fortunate enough at some time or other, unknown and undefined, be able to trace upon some map or somewhere else particulars to enable her to identify this particular plot of land which she has purchased. Therefore the decree which we will make will operate fairly between the plaintiff and defendant 1. The burden of the argument on behalf of defendant 1 before us has been that the property is in existence in fact. If it is, defendant 1 can physically give possession through the agency of this Court to the plaintiff. If it is not there, he can refund the money which has been paid with interest thereon.

Therefore the decree will be an order declaring the plaintiff entitled to possession and to be put in possession by defendant 1 within three months from this date. In default of clear possession being given within that time, defendant 1 shall pay to the plaintiff Rs. 525 with interest at 12 per cent. per annum, until payment. Defendant 2 has not appealed from the decree against him in favour of the plaintiff for Rs. 275. This decree will stand in the form declared by the Subordinate Judge. Defendant 1 must pay the plaintiff's costs in the first Court and in the lower appellate Court and of this appeal.

Chapman, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 223

CHAMIER, C. J. AND KINGSFORD, J.

Hanuman Rai — Defendant—Appellant.

v.

Jagdis Rai and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 257 of 1913, Decided on 22nd June 1916, from decision of Offg. Addl. Sub-Judge, Darbhanga, D/- 20th June 1913.

(a) Civil P. C. (5 of 1908), O. 32, R. 7—
—Minor—Compromise by guardian without leave of Court is not binding on minor.

No next friend or guardian can compromise a case on behalf of a minor without the leave of the Court expressly recorded in the proceedings, [P 224 C 2]

(b) Civil P. C. (5 of 1908), O. 32, R. 7—
Reference to arbitration in pursuance of compromise does not amount to sanction of Court.

The action of a Court in referring a case to arbitration in accordance with a compromise between the guardian of a minor and the other parties to the suit is not equivalent to approving of the compromise on behalf of the minor. [P 224 C 2]

(c) Civil P. C. (5 of 1908), O. 32, R. 7—
Petition for leave can be withdrawn before leave is granted.

It is open to a guardian to withdraw a petition asking leave to enter into a compromise, at any time before leave is granted. [P 225 C 1]

E. P. Pugh—for Appellant.

Ganesh Dutt Singh—for Respondents.

Chamier, C. J.—This appeal arises out of a suit brought by the respondent Jagdis Rai against his three first cousins and a first cousin once removed for partition of what was alleged to be joint family property. Jagdis Rai sued by his next friend Mt. Lal Kuar. Defendant 1 to the suit, Hanuman Rai, was described in the plaint as a minor under the guardianship of his mother Mt. Raj Rani. The plaint was filed on 15th March 1912. Three days later a petition was presented on behalf of the plaintiff in the suit, alleging that a sum of Rs. 40,000, which appears as item 5 in Sch. 1 attached to the plaint, lay buried in the house occupied by defendant 1. The plaintiff prayed that the floors of the rooms of the house might be dug up and any money found there brought into Court. On the following day Mt. Raj Rani presented a petition on behalf of her son objecting to the plaintiffs' petition that the floors should be dug up, and suggesting that if that petition was allowed the floors of the house in the occupation of the plaintiff should also be dug up. The Court directed that the floors of the room of both parties should be dug up and a pleader practising in the Court was appointed to supervise the digging up of the rooms. On 19th March the pleader went to the houses of the parties. When he was about to have the floors dug up, the representatives of both parties asked him to stay proceedings for a while in order that they might enter into a compromise. After some discussion in which the parties and their

pleaders took part, a document in the form of a petition to the Court was prepared and signed by all parties. It set out that a compromise had been effected on the following terms, namely, that in consideration of the plaintiff abandoning the order for the digging up of the floors, defendant 1 would pay within two months Rs. 2,350 to the plaintiff and Rs. 2,350 to defendants 2 to 4, and that as regards other moveable and immovable properties mentioned in the schedule to the plaint or other properties which might be added thereto by either party, it had been agreed that the partition of the same should be referred to three arbitrators, who were named. The rest of the petition of compromise is not material for our present purpose. The petition after being signed was handed over to the Pleader Commissioner and by him was filed in Court on 22nd March. Meanwhile on 21st March Mt. Raj Rani filed a petition in Court praying for leave to enter into the compromise. No order was passed on that application for more than a year.

No order could have been passed on it when it was presented, for up to that time Mt. Raj Rani had not been appointed guardian ad litem of defendant 1. The record shows that she was not appointed guardian ad litem until 29th March 1912. The plaint was then amended and on 1st May the Court referred the partition of the property to the three persons named in the petition of compromise. Several applications were made by the arbitrators for further time for submission of their award. Ultimately on 2nd April 1913, the Subordinate Judge requested the arbitrators to file their award by 23rd April 1913, or to return the record without the award. On 23rd April the arbitrators asked for further time up to 19th May. Even then the award was not filed and ultimately the reference to arbitration was superseded. In the meantime on 11th April 1913, the plaintiff applied to the Court to draw up a preliminary decree. The object of this was presumably to obtain a decree for payment of the two sums of Rs. 2,350 mentioned in the award. This application came on for hearing on 10th May 1913, after the case had been transferred to another Court. Mt. Raj Rani put in a petition protesting against the compromise and denying that she had ever signed it or had understood that a compromise was being effected.

The Subordinate Judge decided that she was bound by the terms of the compromise and he passed a decree accordingly.

It is quite clear that in one respect at all events the decree of the Subordinate Judge cannot stand, for it leaves the parties to obtain partition of the properties by another suit or other proceedings. If the compromise was binding upon defendant 1 and upon all other parties to the suit, the first Subordinate Judge was right in referring the case to the arbitrators mentioned in the agreement. But when they failed to act, the Subordinate Judge should either have appointed other arbitrators or have superseded the arbitration altogether and tried the case out in the ordinary way. The question is whether the solehnama is binding on defendant 1. O. 32, R. 7, provides that no next friend or guardian to the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he comes as next friend or guardian. This rule differs from the corresponding provision, S. 462, in the Code of 1882, in that it requires the leave of the Court to be expressly recorded in the proceedings. Under the Code of 1882 it might perhaps have been held that inasmuch as the Court proceeded to refer the case to arbitration in pursuance of the compromise, it must be taken to have approved of the compromise on behalf of the minor defendant 1. S. 462 of Code of 1882 gave rise to many difficulties and it was no doubt in order to get rid of these difficulties that words were added to R. 7, O. 32 requiring the leave of the Court to be expressly recorded in the proceedings. With reference to the present rule, it is impossible to hold that the action of the Court in proceeding to refer the case to arbitration was equivalent to approving of the compromise on behalf of the minor. No express approval was accorded to the compromise until 20th June 1913, but before that date, namely, on 10th May 1913, Mt. Raj Rani had presented her petition in which she declined to go on with the compromise and alleged that she had been overreached in the matter.

It appears to me that it would not be right to hold that the Court was entitled to force the compromise on Mt. Raj Rani after she had withdrawn her petition

praying for the leave of the Court to enter into the compromise. It was open to her to withdraw the petition at any time before leave was granted. The learned vakil for the plaintiff-respondent urges that Mt. Raj Rani should not have been allowed to withdraw her petition for leave under O. 32, R. 7, considering that proceedings in the suit had continued for more than a year since the compromise was filed. One answer to this is that no effective proceedings were taken during the interval and another is that it was the business of the plaintiff to see that the compromise was duly sanctioned by the Court before he proceeded with the suit. I am not prepared to whittle away the salutary provisions of O. 32, R. 7. In my opinion the compromise was not binding on the minor, inasmuch as the leave of the Court had not been obtained before his guardian thought fit to withdraw her application for that leave. I would therefore allow this appeal, set aside the decree of the Subordinate Judge, and remand the case to the Court below to be disposed of according to law. But in view of the conduct of Mt. Raj Rani I would make no order as to the costs of this appeal.

Kingsford, J.—I agree

V.S./R.K. *Case remanded.*

A. I. R. 1916 Patna 225

SHARFUDDIN AND ROE, JJ.

Lakshminarain Mahto — Plaintiff—Appellant.

v.

Satya Narain Chakravarty — Defendant—Respondent.

Appeal No. 53 of 1915, Decided on 20th April 1916, from appellate order of Dist. Judge, Santal Parganas, D/- 8th November 1914.

(a) **Ghatwali Tenure**—It can in some cases be sold in rent decree.

The contention that no ghatwali tenure can be sold in execution of a rent-decree is not a sound one.

Kharagpur ghatwalis can be sold by the landlord in execution of a decree for rent.

[P 226 C 1]

(b) **Bengal Ghatwali Land Regulation (29 of 1814)**—Ghatwals subject to control of Deputy Commissioner—Lands can be sold with consent of Deputy Commissioner and under Raja's control by consent of Raja.

The only ghatwals over whom a Deputy Commissioner has jurisdiction are those who are subject to the provisions of the Bengal Ghatwali Lands Regulation (29 of 1814). Where a ghatwal is liable to render service to a Deputy Com-

missioner and derives his appointment from the Deputy Commissioner, his land can be sold with the consent of the Deputy Commissioner. Where a ghatwal is appointed by a Raja and is not shown to be liable to render service to anybody but the Raja, his ghatwali lands may be sold by the Raja : 9 Cal. 187 (P. C.), *Ref.*

[P 226 C 1]

Mohini Mohan Chakravarty and *Abinash Chandra Chakravarty*—for Appellant.

Roe, J.—This is an appeal from the order of the Deputy Commissioner of the Santal Parganas, affirming an order made by the Subordinate Judge of Jamtara, disallowing objections made by the appellant to the attachment and sale of his tenure in execution of a decree for rent obtained by the Kumars of Hitampore in respect of the said tenure. In the Court of the Subordinate Judge and in that of the Deputy Commissioner the sole contest lay around the question, whether or not the tenure attached was one of the Birbhum ghatwalis. Both Courts were able to show conclusively that it was not one of the Birbhum ghatwalis. The Courts below, therefore, decided that it must be attached and sold in execution of the decree obtained by the Hitampore Estate. In appeal to this Court the contention that the tenure is one of the Birbhum ghatwalis is abandoned. Two points are taken in support of the appeal: first, that all ghatwalis, whether Birbhum ghatwalis or not, are exempt from sale in execution of decrees and; secondly, that part of the terms of a remand, made by the Calcutta High Court in connexion with this same matter at an earlier stage was that the lower Court should consider whether this particular ghatwali, if not a Birbhum ghatwali, is liable to sale in the circumstances of the present case. The first contention obviously cannot be supported. It is certain that there are ghatwalis known as Khargpur ghatwalis, which can be sold by the landlord in execution of a decree for rent. The whole question has been discussed at very great length by Sir Barnes Peacock in the case of *Nilmoni Singh Deo v. Bakranath Singh* (1). His Lordship in that case drew a fine distinction between those ghatwals who were subject to service under Government and those ghatwals who were subject to service only under local Rajas.

It was pointed out by His Lordship that it was impossible for a civil Court

1. (1883) 9 Cal 187=9 I A 104 (P C).

to sell on any account whatever a tenure held in lieu of service to the administrative head of the district. It was also stated at p. 206 of that volume that where the appointment has been made by a Raja there is no bar to a sale in execution being made by the Raja. It is clear that the contention that no ghatwali tenure can be sold in execution is not a sound contention. It remains, therefore, to deal with the question, whether this case should be remanded for further findings of fact upon the question whether this particular ghatwali is of the nature of the Khargpur ghatwalis or not. It is entirely unnecessary for us to waste the time of the parties and the time of the lower Court by any such remand. Para. 4 of the judgment of the learned Deputy Commissioner runs: "Ex. 7 is an order issued by the Raja of Nagar appointing Balaram Mahto, ghatwal." From this it is obvious that the present appellants derive their appointment from the Raja. It is nowhere suggested that they derive anything at all from the Dupty Commissioner.

I would further draw attention to Regn. 14 of 1910, S. 4, from which it will be observed that the only ghatwals over whom the Deputy Commissioner has jurisdiction are those who are subject to the provisions of the Bengal Ghatwali Lands Regn. 29 of 1814. I would also draw attention to the fact that in that same Regulation of 1814 the Deputy Commissioner has power to put up for sale for arrears of revenue such ghatwali lands. The analogy seems to me throughout to be perfect. Where the ghatwal is liable to the Deputy Commissioner and derives his appointment from the Deputy Commissioner, his lands can only be sold with the consent of the Deputy Commissioner. Where the ghatwal is appointed by the Raja and is not shown to be liable to render service to anybody but the Raja, his ghatwali lands may be sold by the Raja. In this case the lands were rightly attached and are liable to be sold. The appeal is dismissed with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 226

CHAMIER, C. J. AND JWALA PRASAD, J.
Daya Bhai and others—Defendants—
Appellants.

v.

Maharaj Bahadur Singh—Plaintiff—
Respondent.

Second Appeal No. 2336 of 1912, Decided on 5th May 1916, from decision of Judicial Commissioner, Chota Nagpur, D/- 27th June 1912.

(a) **Transfer of Property Act (4 of 1882), Ss. 14, 40 and 54**—*Iqrarnamah* covenanting to grant land to society whenever required for building mandir or dharamsala and empowering to take it if refused—Held if covenant is construed as creating interest in land it offends rule against perpetuity—Held that covenant was personal but was unenforceable owing to vagueness—Held grant not being religious endowment rule against perpetuity applies—Further held S. 40 did not apply.

The Raja of Palganj executed an *iqrarnamah* in 1872 in favour of one G as manager of the Sitambari Jain Society, covenanting to grant land on or below Parasnath Hill to the latter whenever they required it for the purpose of building a mandir or dharamsala, and empowering the grantees to take the land if the grantor or his heirs should refuse to give it. The plaintiff, as manager of the Jain Society, gave notice to the Raja that land was required and took possession of suit land in 1907. The defendants, a rival Society, it was alleged, dispossessed the plaintiff. The plaintiff instituted the present suit for possession under the terms of the said *iqrarnamah*:

Held: (1) that, if the covenant was to be construed as creating an interest in the land or as running with the land, it was bad as offending against the rule against perpetuities and preventing the owner from alienating his estate before happening of a condition which may never occur, both on general principles and under Hindu law: 24 W R 321; 5 C W N 343; 5 I C 487; *London South Western Railway Company v. Gomm*, (1882) 20 Ch D 562 and 16 Cal 71, *Ref.* [P 228 C 2; P 231 C 2]

(2) that the covenant was in the nature of a personal contract, and, though as such not obnoxious to the rule against perpetuities was invalid and inoperative owing to its vague and indefinite nature; [P 228 C 1; P 230 C 2]

(3) that the grant did not create a religious endowment but only a secular estate and was therefore not exempt from the rule against perpetuities; [P 231 C 1]

(4) that S. 40, T. P. Act, did not apply to the covenant which was therefore not enforceable against the heirs and assigns of the grantor; [P 231 C 1]

(b) **Practice—Pleadings—Appeal—Suit for possession cannot be converted in suit for specific performance in second appeal**—*Per Jwala Prasad, J.*—Where terms of grant are vague and indefinite suit for possession should not be allowed to be converted to one for specific performance.

Plaintiff could not be allowed, in second appeal, to convert his suit for possession into one for specific performance. [P 229 C 1; P 231 C 2].

Per *Jwala Prasad, J.*—Assuming that the plaintiff was entitled to sue for specific performance, it could not be a sound exercise of the Court's discretion to grant specific performance, having regard to the vague, indefinite and uncertain terms of the covenant: 2 C L J 343; 6 I C 632; A I R 1914 Cal 21 and *Walsh v. Lonsdale*, 21 Ch D 9, Dist. [P 231 C 2]

(c) **Transfer of Property Act (4 of 1882), S. 54**—Per *Chamier, C. J.*—Scope—Contract of sale does not create any interest in property—Possession in pursuance of agreement to give is not same as under sale—Principle of *Walsh v. Lonsdale* 21 Ch. D. 9 should not be applied in India.

Per *Chamier, C. J.*—It would seem to follow from the terms of S. 54, T. P. Act, that a contract to give immovable property does not, of itself, give any interest in the property. [P 228 C 2]

The fact that the plaintiffs have taken possession of the land in pursuance of a contract which could be specifically enforced does not, on the principle of the decision in *Walsh v. Lonsdale*, 21 Ch D 9, give them the same rights as if the land had actually been conveyed to them. The principle of that decision has been applied to India with some misgiving and it should not be applied to this case. It is doubtful whether it should be applied to any case in India, except possibly the Presidency towns. [P 228 C 2; P 229 C 1]

Hasan Imam, K. P. Jayaswal and Sailendra Nath Palit—for Appellants.

Pugh, Shorashi Charan Mitter, Chandra Sekhar Banerjee, Haran, Chandra Mitter and Bankim Chunder De—for Respondent.

Chamier, C. J.—This appeal arises out of a suit by the respondent for possession of a small plot of land in Mauza Madhuban, which adjoins the celebrated hill of Parasnath, both being within the zamindari of the Raja of Palganj. The respondent is the manager of the affairs of the Sitambari Jain Society at Parasnath and Madhuban and he brought this suit for and on behalf of that Society. His case is that under an iqrarnamah of 16th May 1872, executed by Raja Parasnath Singh, father of the present Raja of Palganj, in favour of Harakh Chand Go-laicha representing the Sitambari Jain Society, the Society is entitled to build temples and dharamsalas anywhere that it pleases on the Parasnath Hill or in Madhuban and to take possession of the land required for the same in case the Raja for the time being refuses to give it, that accordingly in 1907 the Society, being under the necessity of building a dharamsala on the land now in suit, gave Raja Parsanath Singh notice to that effect and took possession of the land without objection on his part and remained in possession till April 1910, when it was

dispossessed by the appellant Daya Bhai, acting in the interest of a rival sect of Jains (Digambaris).

The appellants, Daya Bhai and others, who were the principal defendants to the suit, denied that notice had been given to the Raja or that the Sitambari Jains had any intention of building a dharamsala or that they had taken possession of the land, or that they were entitled, as and when they pleased, to take possession of land on the Parasnath Hill or in Mauza Madhuban. These defendants pleaded that they were entitled to the land in suit under a patta granted to them in 1910 by Rani Parbati Kuar, who holds Mauza Madhuban under a khorposh mukarrari executed in her favour in 1902 by Raja Parasnath whose daughter-in-law she was. The Munsif held that the respondent was bound to give notice to the Raja before taking possession of the land. He doubted whether any notice was given in 1907 but held that if notice was given, it was irregular and did not entitle the respondent to take possession; he held also that the respondent had failed to prove that the Sitambari Jains had been in possession from 1907 to 1910. The Judicial Commissioner on appeal held that notice was proved to have been given to the Raja but that it was irregular and defective, inasmuch as it should have been given either to khorposhdar or to the manager of the Raja's estate, which was at the time under the Chota Nagpur Encumbered Estates Act. He held however that the defect in the notice was not fatal to respondent's claim that the Sitambaris were entitled to take possession of the land without notice under the iqrarnamah of 1872, which was a "limited transfer" of the Raja's rights, and that they had in fact taken and held possession for three years. He accordingly decreed the claim. In second appeal it is contended that the provision in the iqrarnamah on which the respondent relies is void for uncertainty and vagueness and also because it offends against the rule against perpetuities or remoteness.

Alternatively it is contended that the provision in question was only a personal contract to convey land to the Sitambaris and created in their favour no interest entitling them to maintain the present suit. The respondent dispute the correctness of the first contention. His position

is that the land which was the subject of the iqrarnamah was not the property of the Raja, but was dedicated to the deity on whose behalf the Sitambari Jain Society managed it and that this was recognized by the iqrarnamah. The respondent urges that if the alternative contention is correct and there was only a personal contract to convey land to the Sitambaris, the contract is binding on the present Raja and his assignees and further that the Sitambaris having taken possession in pursuance of a contract which could be specifically enforced, have on the principle of the decision in *Walsh v. Lonsdale* (1) the same rights as if the land had actually been conveyed to them. In the last resort the respondent contends that the suit should be treated as one for specific performance. The provision in question runs as follows:

"If the Sitambari Jain Society shall require any place on Parasnath Hill or below at Madhuban for erecting mandir or dharmasala and for doing repairs and making bricks for the said purpose in that case I and my heirs shall give for making mandir, dharmasala and bricks, land, stones and timber from the hill free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power (*upne ikhtyar se*)."

It is quite clear that the hill of Parasnath and the village Madhuban were the property of the Raja. On this point it is unnecessary to add anything to what was said by the Calcutta High Court in the famous 'Piggery' case [*Dhunput Singh v. Paresh Nath Singh* (2)]. There is no foundation whatever for the suggestion that the iqrarnamah recognized any title in the deity. If the respondent has any right in or to the land now in suit it must be under the provision set out above. If that provision should be regarded as an attempt to create an interest in favour of future generations of Sitambaris, it is void for remoteness, whether the case is governed by general principles or by S. 14, T. P. Act, or by the Hindu law [if the operation of that section is excluded by S. 2(d) of the Act]: *Chandi Churn Barua v. Sidheswari Debi* (3), *Avula Charamudi v. Marriboyina Raghavulu* (4). If, on the other hand, the provision was no more than a personal contract to convey land to the Sitambaries it is not affected by the rule against remoteness [*Avula Chara-*

mudi v. Marriboyina Raghavulu (4) and *South Eastern Rly. Co. v. Associated Portland Cement Manufacturers* (5)]. In my opinion the provision was not intended to create an interest in favour of the Sitambaries and further such a provision cannot in India be regarded as creating an interest in favour of the other party to the transaction. S. 54, T. P. Act, which, as I understand, reproduces the previously existing law on the subject, provides that a contract for sale of immovable property does not of itself create any interest in the property, and it would seem to follow that a contract to give immovable property does not of itself create any interest in the property.

The respondent, however, contends that the contract is binding upon the present Raja and his assignees including the appellants under S. 40, T. P. Act. Mr. Pugh pointed out that the Act was passed before the decision in the case of *London and South Western Rly. Co. v. Gomm* (6) and he suggested that until that decision was pronounced the case of *Tulk v. Moxhay* (7) was understood to apply as well to affirmative as to restrictive covenants and hence S. 40, T. P. Act, which was intended to reproduce the English law, is not confined to restrictive covenants but applies to every obligation arising out of a contract and annexed to the ownership of immovable property. In this connexion Mr. Pugh relied also upon S. 27 (b), Specific Relief Act. Assuming that this contention is correct, we have next to consider whether the respondent is entitled to maintain this suit. The principle of the decision in *Walsh v. Lonsdale* (1) has been applied in India with some misgiving: see *Bibi Jawahir Kumari v. Chatterput Singh* (8), *Singheeram Poddar v. Bhagbat Chander* (9) and *Puchha Lal v. Kunj Behari Lal* (10)]. It has never been applied to such a case as this where there is no question of an agreement for a lease. In the absence of authority I am certainly not prepared to apply the doctrine of *Walsh v. Lonsdale* (1) to the present case, and I doubt very much whether it should be applied to any case in India except pos-

1. (1869) 21 Oh D 9=52 L J Oh 2.
2. (1894) 21 Cal 180.
3. (1889) 16 Cal 71=15 I A 159 (P O).

4. (1915) 28 I O 871.
5. (1910) 1 Oh D 12=79 L J Oh 150.
6. (1882) 20 Ch D 562=51 L J Ch 530.
7. (1848) 2 Ph 774=1 Hall & Tw 105.
8. (1905) 2 O L J 343.
9. (1910) 6 I C 632.
10. A I R 1914 Cal 21=20 I C 803.

sibly in the Presidency towns. In my opinion the respondent has failed to prove any title to the land in suit and, therefore, the suit as a suit for possession should be dismissed.

Assuming that the respondent might have maintained a suit for specific performance, I do not think that we should at this stage allow him to convert this suit into a suit for specific performance. Nor is there anything in the conduct of the Sitambaris which should induce us to show them any indulgence. The dispute is in reality one between the rival sects. Each sect wishes to keep the other away from the Parasnath Hill. The Sitambaris have gone so far as to contend that the owner of the estate or his representative for the time being must for all time consult the Sitambaris before leasing to other persons any plots of land on the hill or in Madhuban. I would allow Second Appeal No. 2336 of 1912, dismiss the suit and give the appellants their costs in all three Courts.

Jwala Prasad, J.—This appeal arises out of a suit which was brought by the respondent in the Court of the Munsif of Giridih to recover possession of a piece of land measuring two and a half kathas, from which the plaintiff is said to have been dispossessed. The plaintiff is a member and representative of the Sitambari Jain Society and manager and she-bait of Parasnathji on behalf of the said Society. The land in suit is situated at Madhuban close to the Parasnath Hill, which belongs to the Raja of Palganj. The plaintiff has based his claim upon an iqrarnamah, bearing date 16th May 1872, executed by Raja Parasnath Singh, father of the present Raja of Palganj, in favour of Babu Harakh Chand Golaicha, then Manager of the Sitambari Jain Society, in order to settle certain disputes that existed between the Raja and the Sitambari Jain Society regarding the offerings presented to the Jain Mandir which stands on the Parasnath Hill, appertaining to the gaddi Palganj. The plaintiff asserts that by virtue of the said iqrarnamah the Sitambari Jain Society is empowered to build temples and dharamsalas at any place on the Parasnath Hill and in Madhuban according as it pleases and in case of refusal by the Raja or his heirs to give such land, the Society is competent to take the same of its own

power. The plaintiff's case is that by virtue of the right vested in him by the iqrarnamah, he sent an ittala or notice to the Raja of Palganj in 1907, informing him that he required the land in suit for the purpose of erecting a dharamsala, took possession of it in that very year and continued to be in possession without any objection on the part of the said Raja till April 1910, when he was dispossessed by the defendant-appellants, representing the rival Jain Society called the Digambari. The appellants resisted the claim of the plaintiff. They took all possible pleas in their written statement, most of which do not now arise in this appeal and need not be stated.

They contend inter alia that the plaintiff never took possession of the land in suit, that his allegation of possession and dispossession is false and that the plaintiff did not acquire any right to the land and was not entitled to take any land at Madhuban at his own choice, as alleged by the plaintiff. The defendants claim that the land in suit was settled with them in 1910 by Rani Parbati Kuar, in whose favour the late Raja Parasnath Singh had executed a khorposh mukarrari lease on 14th April 1902 for 20 years and that the defendants took possession of the land and built a house on it. Rani Parbati Kuar was subsequently impleaded as defendant in the suit at the instance of the defendants, but she did not contest the suit. The Munsif dismissed the plaintiff's claim, holding that the plaintiff's right in the disputed land was not established and the Society's possession was not proved. The plaintiff appealed to the Judicial Commissioner of Chota Nagpur, who by his judgment, dated 27th June 1912, reversed the decision of the Munsif and decreed the suit in favour of the plaintiff. The appellate Court below has found that the plaintiff took possession of the land for the purpose of erecting a dharamsala in 1907 and remained in possession of it until dispossessed by the defendants in 1910. The lower appellate Court has further held that the iqrarnamah operated as a limited transfer of the Raja's right in favour of the plaintiff and that he was entitled to take possession of the land in suit and as soon as he took possession of it, he acquired a perfect title to it.

It is contended on behalf of the appellant that the plaintiff has no right to the land in the suit and that the iqrar-namah in question is null and void. It is vague and uncertain in its terms and offends against the rule of perpetuities or remoteness applicable to Hindus. It is a suit in ejectment and in order to succeed the plaintiff must clearly establish his title to the land. The plaintiff has based his claim entirely upon the iqrar-namah, which among other things recites as follows :

"If the Sitambari Jain Society shall require any place on Parasnath Hill and below thereof at Madhuban for erecting mandir and dharamsala and for doing repairs and making bricks for the said purpose, in that case I and my heirs shall give for making mandir, dharamsala and bricks land etc., stones from the Hill and timber free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power."

A translation of the clause is also to be found in Ex. 32, judgment in the Piggery case [*Dhunput Singh v. Paresh Nath Singh* (2)]. The covenant in question gives to the Sitambari Society power to take possession of any land on the whole of Parasnath Hill and at Madhuban without any limitation as to time, area or situation and upon the contingency of a dharamsala or temple being required to be built, which may or may not happen, and it is not known when the contingency would arise. The covenant is unlimited in point of time and was obviously intended to be so. It is not possible to insert a limit of time or to put in "within a reasonable time" as it would be contrary to the intention of the parties. If the covenant can in any way be construed to create an interest in the land and as running with the land, it is affected by the rule against remoteness, or perpetuity, inasmuch as it creates a future interest which may possibly vest after an indefinite period, and as by the existence of such interest the owner is prevented from alienating his estate, discharged of it, before the happening of the condition, and that event may possibly never occur. This view was adopted as early as in the case of *Sreemutty Tripoora Soonduree v. Juggur Nath Dutt* (11) and followed in a series of cases [*Nobin Chandra Soot v. Nawab Ali Sarkar* (12) and *Anath*

Nath Maitra v. Kumar Keshab Narain Ray (13)].

In *London South Western Rly. Co. v. Gomm* (6) it was held that the covenant to reconvey land whenever the Company required was invalid, as it gave to the Company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness. In the Privy Council case *Chandi Churn Barua v. Sideswari Debi* (3), the Raja of Bijni had agreed that if ever descendants or the donees were not provided with means of maintenance by the Raja or his heirs, they would be entitled to take possession of the villages mentioned in the agreement. Their Lordships in the Privy Council held that the covenant, was void and ineffectual, observing that the covenant

"might be regarded as importing a present assignment to persons not in existence, subject to a suspensive condition which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favour of non-existing covenantees, to give the villages to them in the event specified."

In either view the covenant was held to be equally ineffectual and to impose a restraint upon alienation which is contrary to the principles of Hindu law. If the covenant purports to give to the Sitambaris a right to take any land and at any time they like on the whole of the Parasnath Hill, which covers a very large area, it prevents the owner of the property or his successors from ever alienating the property, discharged of the estate created by the covenant. It is vague, indefinite and unreasonable in its terms and hence invalid and inoperative. Thus if the covenant in question be regarded as creating an interest in land in favour of the Sitambaris for all time, it is void for remoteness both on general principles and under the Hindu law. It is further contended on behalf of the plaintiff-responseent that the Parasnath Hill was not the property of the Raja but it belonged to the Sitambari Jains and was dedicated to the deity, and that the agreement in question did not create a new interest in them but simply confirmed the pre-existing title of the Society. The Sitambaris, therefore, having taken possession of the land in suit in order to erect a dharamsala, could not be ousted by the Raja of Palganj or his transferees, the de-

11. (2875) 24 W R 321.

12. (1910) 5 C W N 343.

13. (1910) 5 I C 487.

fendants. There is no evidence on the record to show that the hill ever belonged to the Sitambaris. On the other hand the recital in the agreement itself, the pleadings in the case and the judgment in the Piggery case, *Dhunput Singh v. Paresh Nath Singh* (2), clearly show that the hill is the property of the gaddi Palganj and the name of the Raja as proprietor thereof is registered in the record of earliest Settlement of the hill.

The contention of the respondent that the grant creates a religious endowment and hence the rule as to perpetuities does not apply, must fail. The iqrarnamah creates only a secular estate, if at all, though the motive may be a religious one. There is no dedication to any deity in the iqrarnamah and it cannot stand on the same footing as a religious endowment and is not exempt from the rule against perpetuities as held in *Anantha Tirtha Chariar v. Nagamuthu Ambatagaren* (14). The covenant in question does not, to my mind, in any way create any interest in land in favour of the plaintiff. It is not a transfer of any right in the property and, therefore, does not give to the plaintiff a right, vested or conditional, in the land. Under S. 54, T. P. Act, a contract for the sale of immovable property does not itself create any interest in the property. It is nothing more than a personal contract by the late Raja Paras-nath, the executant of the agreement in favour of the Sitambaris. If it is merely a personal covenant to convey land, it is of course not obnoxious to the rule of remoteness, as held in the *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers* (5) and *Avula Charamudi v. Marriboyina Raghavulu* (4). The respondent, however, contends that if it is a personal covenant, it is binding upon the Raja who executed the agreement of 1872 and his heir, the present Raja of Palganj, as well as upon his assignees including the appellants. Counsel for the respondent has relied upon S. 40, T. P. Act, and upon the decision in *Tulk v. Moxhay* (7). S. 40, T. P. Act, does not apply to the covenant in question. S. 2, T. P. Act, makes Ch. 11, in which S. 40 occurs, subject to the rules of Hindu law.

The principle of the decision in *Tulk v. Moxhay* (7), only applies to restric-

tive covenants and does not apply to the covenant in question, which is clearly an affirmative one and I cannot agree with the learned counsel for the respondent when he asks us to read into the covenant a restrictive clause by implication. Our attention has been drawn to S. 27 (b), Specific Relief Act, to show that the agreement is binding upon the assignees of the covenantor including the present appellants. The question is whether the covenant is a contract of which specific performance could be obtained. I doubt whether it would be a sound exercise of discretion under S. 27, Specific Relief Act, to grant specific performance of the covenant in question, regard being had to the vague, indefinite and uncertain terms of the covenant. The agreement was executed in 1872 and in 1902 the Raja granted the estate in which the land in suit is situate to the khorposhdar. No attempt was made to enforce the rights given to Sitambaris under the covenant in question until 1907. The Raja is dead and his present heir is not made a party to the suit. In *Bibi Jawahir Kumari v. Chatterput Singh* (8) and *Singheeram Poddar v. Bhagbat Chander* (9), the agreements for lease were complete in every respect and were acted upon by the delivery of possession of the premises and the payment of rent. Similarly in *Puchha Lal v. Kunj Behari Lal* (10), the purchase-money was paid and the possession of the property sold was obtained under the kabala. In the case, following the principle of *Walsh v. Lonsdale* (1), it was held that the requisite formalities of the execution of documents and the registration thereof did not bar the accrual of the legal rights and liabilities as between the parties to the agreement and that specific performance of such a contract could be given effect to.

There was no question in these cases of the covenant being vague or indefinite or being affected by the rules as to remoteness or perpetuity. These authorities, therefore, have no application to the present case. Assuming that the plaintiff could have maintained a suit for specific performance, he is not entitled to any relief in the suit as framed and he cannot be allowed to amend the plaint at this stage so as to materially alter the character of the suit. The plaintiff has failed to prove his title to the land and cannot maintain the suit for ejectment.

The result is that the suit must be dismissed and the appeal allowed with costs.

By the Court—The order of this Court is that this Appeal (No. 2336 of 1912) is allowed and the suit is dismissed. The appellants will get their cost from the respondent in all three Courts.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 232

CHAMIER, C. J. AND SHARFUDDIN, J.

Kuldip Pandey and others—Accused—Petitioners.

v.

Ramnath Singh—Complainant—Opposite Party.

Criminal Revn. No. 181 of 1916, Decided on 7th July 1916.

Bengal Tenancy Act (8 of 1885), S. 71 (4)—Scope—Landlord and Tenant—Dishonest removal of crops sown on batai system—Liability for conviction under Penal Code (45 of 1860), S. 424.

The object of S. 71, sub-S. (4), Ben. Ten. Act, is to provide the Courts with a definite rule as to the value of crops which have been wrongly removed by a tenant. If the tenant acts dishonestly in removing them, he is also liable to be convicted under S. 424, I. P. C.: *A I R 1914 Mad 398, Ref.* [P 232 (1) 2]

Yunus and Kailaspati—for Petitioners.

Gowhar Ali and Krishna Sahay—for Opposite Party.

Chamier, C. J.—The applicants have been convicted of an offence under S. 424, I. P. C. The facts found are that they hold a number of fields on the batai system. At the time of the affair now in question, they were engaged in litigation with their landlord under S. 40, Ben. Ten. Act. They went to their fields in a body and cut and carried off the paddy crop despite the remonstrances of the landlord's patwari. The Second Class Magistrate who tried the case recorded a definite finding that the applicants in removing the crop had acted dishonestly. It is contended that there is no such finding in the judgment of the Magistrate who heard the appeal. But that officer after dealing with the evidence says that he affirms the findings of the first Court. There can be no question that the appellate Court intended to find that the applicants in removing the crop acted dishonestly, nor can there be any doubt that the findings of the Courts below upon this point are correct. The applicants removed the crop from the

fields in order to prevent the landlord from obtaining his due share thereof. It is contended that even if they acted dishonestly they are not liable to be convicted under S. 424, I. P. C., because it is provided by S. 71, sub-S. 4, Ben. Ten. Act, that if a tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisal or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest. Counsel contends that this is the only penalty to which a tenant exposes himself, if he removes the crop of a field which he holds under the batai system and that he cannot be prosecuted under the Indian Penal Code. It is impossible to accept this contention. The object of S. 71, sub-S. 4, is to provide the Courts with a definite rule as to the value of crops which have been wrongly removed by the tenant. If the tenant acts dishonestly he is also liable to be convicted under S. 424, I. P. C. Counsel for the applicants says that there is no reported case in the Calcutta High Court on the subject. That, if correct, affords no reason for not convicting the applicants under the Penal Code. I fear that what generally happens when a tenant attempts to carry off a crop in this manner, is that he is resisted by the landlord and a fight ensues and the tenant is punished under another section of the Penal Code.

A case not unlike the present case came before the Madras High Court in 1914: see *In re, Sivanupandia Thevan* (1). In that case the accused, who was a raiyat under the Madras Estates Land Act and who was bound under the conditions of his tenure to share the produce of his land with the landholder in a certain proportion, dishonestly concealed and removed the produce thus preventing the landholder from taking his due share. Tyabji, J., held, that the provisions of Ss. 73 and 212, Madras Estates Land Act, were no bar to a conviction of the raiyat under S. 424, I. P. C. In my opinion the applicants were rightly convicted, and I see no reason to interfere with the sentences inflicted. I would direct that the applicant surrender to their bail in

order to serve out the remainder of their sentences.

Sharfuddin, J.—I agree,
V.S./R.K. *Petition dismissed.*

A. I. R. 1916 Patna 233 (1)

CHAMIER, C. J. AND JWALA PRASAD, J.

Srikishen Lal and another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 17 of 1916, Decided on 31st March 1916, against order of Dy. Commr. Hazaribagh, D/- 6th March 1916.

Criminal P. C. (5 of 1898), S. 436—Order of discharge—Revision by District Magistrate—Committal to Court of Session on grounds of expediency was held insufficient to interfere with order of discharge.

A District Magistrate, acting under S. 436, Criminal P. C., set aside an order of discharge of a Police Officer on a charge of extortion, on the ground that the charge related to the conduct of a Police Officer and that it was desirable that the case should be tried by the Court of Session:

Held: that it was incumbent on the District Magistrate to record his own finding on the evidence before committing the case to Court of Session and that the gravity of the charge was not a sufficient reason for interfering with the lower Court's order of discharge. [P 233 C 2]

Muzharul Haque—for Petitioners.

Judgment.—In this case a Magistrate of the first Class enquired into a charge that had been made against two Police Officers under S. 330, I. P. C., and after recording a quantity of evidence came to the conclusion that the story told by the witnesses for the prosecution was untrue. He therefore discharged both the accused. The District Magistrate under S. 436, Criminal P. C. has ordered that both the accused be committed to the Court of Session. The District Magistrate after setting out that the Deputy Magistrate had come to the conclusion that the allegations against the accused were false said that he had considered not merely the evidence but also the circumstances under which that evidence had been given, and he was of opinion that the case was eminently one which should be tried by a Court of Session. He said that the evidence was of a character which required for a proper appreciation of its value very great experience of judicial work and that the charges related to the conduct of Police Officers and were of a character which Government regarded with great solicitude. He concluded by saying that every consideration pointed to the desirability of having the case decided by the Judicial

Commissioner, that is, by the Sessions Judge. So far as can be gathered from the District Magistrate's order his reasons for setting aside the order of discharge are that the case is of an important character which ought to go before the Court of Session.

He does not say that he considers with reference to the evidence that the accused had been improperly discharged, and his order contains no materials which enable this Court to decide whether the order was a reasonable one or not. The order strongly suggests to our minds that the real reason for setting aside the order of the Deputy Magistrate is that a charge of such a character should, in the opinion of the District Magistrate, be considered by a Court of Session. That is not a sufficient reason for interfering with the order of discharge. We set aside the District Magistrate's order leaving him to take any further action which he may think proper.

V.S./R.K.

Order set aside.

A. I. R. 1916 Patna 233 (2)

MULLICK AND ATKINSON, JJ.

Danai Das and others—Plaintiffs—Appellants.

v.

Govinda Gedi and others—Defendants—Respondents.

Second Appeal No. 2611 of 1915, Decided on 25th July 1916, from the decision of Sub-Judge, Cuttack, D/- 21st July 1915.

Tort—Trespass—To succeed, illegality and wrongfulness of act must be established.

The foundation of trespass is the doing of an illegal act, forcibly and without legal authority, as against the property of another. To sustain trespass the illegality and the wrongfulness of the act must be established by proof. If the act is not illegal no right is infringed.

[P 234 C 1]

Satish Chandra Bose—for Appellants.

Atkinson, J.—The facts of this case are shortly as follows: The plaintiffs are lessees of a fishery which they hold from the Raja of Aul at a rent of Rs. 350 a year and which is situated in mouza Rambhila; the name of the fishery is Singiri. The plaintiffs' case is, and they allege in their statement of claim, that the defendants wrongfully, forcibly and illegally opened a flood gate erected in the embankment dividing the paddy fields over which these fishery rights exist, from the river running through the village of Rambhila, causing the

plaintiffs damage by injuring the fish. It appears that this culvert was erected by the Raja for the purpose of protecting the fishery and the paddy fields. On 22nd September 1910, the defendants, with the permission of the Raja, opened the shutter of this culvert to allow the heavy flood water to be discharged from the paddy fields into the river. The plaintiffs claim that this was done illegally and wrongfully, and in such a manner as to constitute towards them an act of trespass by the defendants, and for that they claim damages.

The learned Judge who heard this case has decided that the act that was done was not wrongful and not illegal as alleged by the plaintiffs. The foundation of trespass is the doing of an illegal act, forcibly and without legal authority, as against the property of another. To sustain trespass the illegality and the wrongfulness of the act must be established by proof. If the act is not illegal no right is infringed. The Judge has found here that there was no illegal trespass committed by the defendants. Even if the defendants did open the gate as alleged, they opened it, not acting in violation of any of the plaintiffs' rights, but by the authority of the Raja who was the owner of the flood gate and who was entitled to open it himself on his own responsibility. If any injury was done to the plaintiffs by reasons of the opening of the gate, that was an act attributable to the Raja and not to the defendants. However, the action does not necessarily fail upon that ground, because the learned Subordinate Judge has held, that notwithstanding that illegal trespass was not proved, the opening of the gate was some technical infringement of the plaintiffs' rights; and that consequently he would have to consider the question of damages. He has found that the plaintiffs proved no damages. They have not proved that the quantity of fish in the fishery before the alleged opening of this shutter was any less after 22nd September 1910, or that there were no fish left. It is a mere wild assertion of 'damage without one shred of evidence as to the extent of the damage-sustained. Mr. Bose contends that there has been some technical trespass and he is entitled to nominal damages. The finding of the learned Subordinate Judge is that there has been no trespass

in point of law. I am satisfied that there has been no trespass; then there can be no damage. Even assuming the Subordinate Judge was right and there was some technical infringement of the plaintiffs' rights in opening this shutter, nevertheless no damages has been established, and the action is one fit and proper to be dismissed. It is well to remember that in this case although the wrongful act alleged by the plaintiffs, took place on 22nd September 1910, it took these plaintiffs three years, all but one month, to institute the present action. This appeal is dismissed and the action is dismissed with costs in all Courts.

Mullick, J.—I agree that the action has no merits whatever and should be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 234

MULLICK AND ATKINSON, JJ.

Puri Dass—Plaintiff—Appellant.

v.

Kannu Behera—Defendant—Respondent.

Second Appeal No. 4191 of 1913, Decided on 26th July 1916, from decision of Dist. Judge, Cuttack, D/- 18th September 1913.

Bengal Alluvion and Diluvion Regulation (1825), S. 4—S. 4 applies to private rivers as well.

Section 4, Regn. 11, of 1825, is applicable to a river the bed of which is the property of a private person and is not limited in its application to rivers belonging to the Crown: 14 W. R. 11 (P. C.) and 14 W. R. 254, *Foll*; 5 I. C. 723, *Ref*.

[P 295 C 1]

Satish Chandra Bose—for Appellant.

Dhirendra Nath Dutt and *B. N. Misra*—for Respondent.

Mullick, J.—The plaintiffs are raiyats who claims the lands insuit as accretions to their occupancy holdings upon the strength of S. 4, Regn. 11 of 1825. The only point of law argued before us on behalf of the landlords defendants is that the river out of the bed of which the accretions are alleged to have formed is the Private property of defendant 4, and that S. 4, Regn. 11 of 1825, does not apply to a river the bed of which is not the property of the Crown. No direct authority has been cited by the learned vakil, for the appellants in support of his contention. The only thing that he can show us is the case of *Lopez v. Maddun*

Mohun Thakur (1) and he relies upon certain observations of their lordships of the privy Council as a foundation for the proposition that their lordships intended to make a distinction between a river which is private property and a river of which the bed belongs to the Crown. In my opinion the judgment of their Lordships does not in clear terms make any such distinction. The section itself is perfectly intelligible without any such distinction, and I see no reason why any words of limitation should be inserted into it when no such limitation is necessary on the face of the enactment itself. On the contrary if the contention of the learned vakil for the appellants is to be accepted, and rivers which are the property of the Crown are the only rivers to which the Regulation refers, then it is difficult to see what necessity there was for importing Cl. 4 into the Regulation. That clause makes special reference to island-chars, thrown up in small and shallow rivers. There would have been no necessity whatsoever for legislating for this class of river if by hypothesis the whole Regulation was intended to be inapplicable to it. Moreover, there is direct authority in regard to the very river with which we are dealing in this suit. In the case of *Unnopoorno Debia v. Sremutty Dossee* (2), a Division Bench of the Calcutta High Court held that Regn. 11 of 1825 was applicable and the language used by the learned Judges was as follows:

"The case must be re-tried before the Judge, in order that he may determine upon the evidence how this land formed; and if it was the result of gradual accretion, to what lands it so accreted; and that he may determine the rights of the parties in precise conformity with the words of the Regulation; that is to say, he will find to whose land or tenure the formation is most contiguous."

Again in the case of *Mahadeo Pershad v. Mathura Tanti* (3), the river in question was the river Kamala, and it would appear that although the landlord claimed it the Court held that accretions formed out of its bed were covered by Regn. 11 of 1825. I see no reason for holding that Regn. 11 of 1825 is to be restricted in the manner, desired by the learned vakil for the appellants, in particular as within 46 years that have elapsed since the case of *Lopez v. Muddun Mohun Thakoor* (1) not a single decision has been

shown to us supporting his contention. The appeal is dismissed with costs.

Atkinson, J.—I just desire to add one word on the construction of Regn. 11 as submitted in the argument of Mr. Bose on behalf of the defendant. He says in order to support his argument it is necessary for him to read into the Regulation after the word "river" the words "belonging to the Crown;" and he admits that without the addition of these words "belonging to the Crown" there is no substance in his argument. I for myself know of no authority which empowers a Court to import into a Statute any words not expressly authorized by the legislature. These Regulations have the effect of Statutes and it is not our province or our duty to add words to an Act of Parliament which are not to be found there. I think on the plain construction of the Regulation itself it is intended to apply to private as well as public rivers. I concur with the judgment of my learned brother and with his observation.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 235

ROE AND JWALA PRASAD, JJ.

Suraj Deo Narayan Singh—Judgment-debtor—Appellant.

v.

Musahroo Raut and others—Decree-holders—Respondents.

Second Appeal No. 516 of 1914, Decided on 16th May 1916, from order of Dist. Judge, Darbhanga, D/- 27th July 1914.

Limitation Act (9 of 1908), Art. 182—Time runs from pronouncement of decree and not when signed.

A decree for redemption was passed on 27th July 1909. The District Judge appointed a Commissioner to find out the exact sum to be paid in redemption, though that was only a matter of official routine. He actually signed the decree on 23rd February 1910. The defendant applied on 29th January 1913 to execute that portion of the decree which awarded to him costs payable by the plaintiff:

Held: that time commenced to run from the date when the decree was pronounced on 27th July 1909 and that the application was barred: 25 Cal. 109, Ref. [P 236 C 1]

Baidyanath N. Sinha—for Appellant.

Saroshi Charan Mitter—for Respondents.

Judgment.—This appeal arises from an order of the District Judge of Darbhanga, holding that an application for the execution of a decree bearing the signature of the District Judge, under

1. (1870) 14 W R 11 (P O).

2. (1870) 14 W R 254.

3. (1910) 5 I O 723.

dated 27th July 1909, and made in a suit for redemption was not barred by limitation on 29th January 1913. The decree was actually signed on 23rd February 1910. The reason upon which the learned District Judge has based his decision that limitation should run from February 1910, is that it was necessary, in order to the preparing of the decree made upon the judgment dated 27th July 1909, to take an account through a Commissioner and ascertain the exact amount for which the property in suit might be redeemed, and the amount was not definitely ascertained till 23rd February 1910. That part of the decree under execution before us is not with reference to the redemption of the property, but with reference to the costs payable by the plaintiffs for redemption to the defendants-mortgagees. This, however, is immaterial. The decree itself bears a certain date. That date has been placed upon it in accordance with the provisions of the Code, and before it can be said that it should be regarded as bearing any other date, there must be some ground more substantial than that given by the learned District Judge. The judgment of the District Judge, dated 27th July 1909, sets forth clearly the exact method of ascertaining the sum to be paid in redemption.

The calculation of that sum was a matter purely of office routine, and it would have been unnecessary for the District Judge to pass any further orders on the matter at all. That he chose to appoint a Commissioner to assist in the preparation of the decree, and himself supervised the work of the Commissioner, does not affect the fact that the preparation of the decree is a routine matter. We hold that the decree was rightly dated by the District Judge 27th July 1909 and it was barred by limitation on 29th January 1913. In this view we are fortified by the decision in the case of *Golam Gaffar Mandal v. Goljan Bibi* (1). The facts of the case before us are indistinguishable from the facts of that case. The appeal must, therefore, be decreed with costs, hearing fee one gold mohur.

V.S./R.K.

Appeal allowed.

1. (1894) 25 Cal 109.

A. I. R. 1916 Patna 236

ATKINSON AND JWALA PRASAD, JJ.

Eknath Sahay and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 34 of 1916, Decided on 12th June 1916, against judgment of Addl. Sess. Judge., Patna, D/- 20th March 1916.

(a) Criminal P. C. (5 of 1898), S. 367—Non-direction not necessarily misdirection to Jury—Misdirection to Jury what amounts to, explained.

Mere non-direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said, or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively. [P 237 C 2]

(b) Criminal P. C. (5 of 1898), S. 367—Writing out charge in extenso not required—Headings of charge—Contents of—Functions of Judge and Jury discussed.

A Judge is not required under S. 367, Criminal P. C., to write out in extenso the charge which he addresses to the Jury, but he should set forth in writing the headings of his charge; and such headings afterwards form part of the record of the proceedings in the trial before him. As the term "heads of charge" itself implies, the Judge must faithfully record the lines upon which he addressed the Jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the Jury, and the nature of his summing up of the evidence, not only for the prosecution but also for the defence. The headings of charge do not purport, nor are they intended by Statute, to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. They should only record, in an intelligent form and with sufficient fulness, the points of law and the directions given by the Judge to the Jury. [P 237 C 2 P 238 C 1]

But in considering the language used, one must not parse the headings of charge as if it were an indictment. The method of expression and its form may be unsatisfactory, but if in substance one can see from the frame of the heads of charge what were the directions which the Judge gave to the Jury, and that they were right and proper, then there can be no ground of complaint, even though the phraseology and form adopted might be open to question. [P 238 C 2]

It is the sole function of the Judge to direct the Jury on all matters of law and the Jury must take their direction in law from the Judge. The Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury: 34 Cal. 698; 36 Cal. 281 and A. I. R. 1914 All. 207 Ref.

[P 238 C 1]

(c) Criminal P. C. (5 of 1898), S. 257—**Cross-examination of witnesses—Scope can be restricted.**

A trial Judge can restrict the scope of the cross-examination of witnesses. [P 237 C 1]

Sinha and Gour Chandra Pal—for Accused.

Govt. Advocate and Public Prosecutor—for the Crown.

Atkinson, J.—The five accused together with 13 others were jointly indicated for unlawful assembly, riot, murder and dacoity with the intention of committing hurt and mischief to certain Rajputs on 10th September 1915. 18 of the 23 have been acquitted by the Jury who tried this case before Mr. Rowland, Additional Sessions Judge, sitting in and for the District of Patna. The case was heard early in the present year, and after a trial extending over 42 days, on 20th March 1916, the Jury brought in a verdict finding the 5 accused guilty of riot under S. 147, I. P. C. and of unlawful assembly under S. 326 read in conjunction with S. 149. The trial, as I have said, was a very protracted one, mainly due to much unnecessary and immaterial cross-examination; and I think the Judge would have been perfectly within his rights had he limited and restricted the scope of the cross-examination which was indulged in on behalf of the defence; and in saying this I am fortified by the expression of opinion by the Jury. The Jury negatived the charge of murder and of dacoity with intent to commit hurt; and have merely found the five accused persons guilty of riot and unlawful assembly with the common object of causing hurt to various Rajputs, but particularly towards Somar Rai, and of causing the death of one Ram Lal Rai. From that conviction an application is now made by way of petition on appeal under S. 419, Criminal P. C., seeking an order for retrial of this case on the ground of the misdirection in law of the learned Judge at the trial, and on the further ground that the learned Judge did not fairly put before the Jury matters and circumstances in support of the defence. It is unnecessary to do more than briefly refer to the facts of the case.

Eknath Sahay is a Mukhtear of this Court residing at Panwara, and it appears that he obtained judgment against Ram Lal Rai on foot of a mortgage-bond. Ram Lal Rai resided at Dhodhochak, and 10th September 1915 was appointed as the day

upon which execution on foot of the decree was to be levied, and under which Eknath Sahay had become the auction-purchaser of the property of Ram Lal Rai which was sold in pursuance of the decree. Two peons of the Court were commissioned to make the seizure, and deliver possession to Eknath Sahay as the purchaser, and to attach all available moveable property of the judgment-debtor to satisfy the judgment-debt. From the evidence, it appears in support of the case for the prosecution that Eknath Sahay, being a person of some legal qualifications and a man of about 51 years of age, organised on 10th September 1915 at the village of Panwara a crowd of 400 persons from amongst his retainers there, and at the head of this force marched to the village of Dhodhachak one mile distant, and attacked the Rajputs who were living there, causing the death of Ram Lal Rai. The mob, headed by Eknath Sahay, assembled in the village of Dhodhochak between the hours of 2 and 3 o'clock, and then occurred the incidents which gave rise to this prosecution, and wherein Ram Lal Rai lost his life and Somar Rai received grave and serious injuries; and for the part which the five accused persons took in the incidents of that day, the Jury have found them guilty. The defence is that the entire charge is a false one, that there was no riot or unlawful assembly, and that none of them were members of a riotous mob and are not responsible for the incidents that took place on 10th September.

The petition on appeal contains some 29 grounds, on which it is alleged that this conviction should be quashed and a new trial of the case directed; but of these 29 grounds only 15 were pressed in argument before us. This case was argued before us by Mr. Sinha and the Government Advocate with great ability, energy and determination and we have received much assistance from the arguments adduced to us. The first and perhaps the most important ground was the alleged misdirection of the learned Judge to the Jury in point of law. No doubt, under S. 367 a Judge is not required to write out in extenso the charge which he addresses to the Jury, but under the section that I have referred to the law requires that the Judge shall set forth in writing the headings of his charge to the Jury, and such headings afterwards

form part of the record of the proceedings in the trial before him. As the term "heads of charge" itself implies, it means that the Judge must faithfully record the lines upon which he addressed the Jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the Jury, and the nature of his summing up of the evidence not only for the prosecution but also for the defence. But the headings of charge do not purport nor are they intended by Statute, to be an exhaustive detail of every particular which the Judge may have addressed to the Jury.

It is undoubted law that it is the sole function of the Judge to direct the Jury on all matters of law, and the Jury must take their direction in law from the Judge. It is equally certain that the Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury. But this does not mean that he must in every particular and in every detail address himself to every suggestion put forward by the defence. His duty is fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively. And in doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's counsel, in considering his presentation of the evidence to the Jury. As I have said, the function of these heads of charge is for the guidance and information of the High Court and it is for the Judges on appeal, in applications similar to the present one, to construe the heads of charge as prepared by the Judge, and see if from such heads the Judge has fairly and properly directed the Jury in point of law, and whether he has fairly and properly reviewed the evidence in support of the prosecution and of the defence. I admit that these headings of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury: *Panchu Das v. Emperor* (1), and that the record should represent with accuracy the substance of the charge by the Judge: *Fanindra Nath Banerji v. Emperor* (2). I am

clearly of opinion that the two cases¹ I have referred to lay down the general principle to be applied by Judges in preparing the heads of charge. But it is equally certain that one in considering the language used must not parse the headings of charge as if they were an indictment.

The method of expression and its form may be unsatisfactory, but if in substance one can see from the frame of the heads of charge what were the directions which the learned Judge gave to the Jury and that they were right and proper, then there can be no ground of complaint, even though the phraseology and form adopted might be open to question; *Hooper v. Emperor* (3) clearly lays this down. What one has to see and consider from the words used is the direction given, and that it was fair and right. Mere informality in expression or form would not be sufficient to invalidate the conviction. Thus it is for us to construe the heads of charge as best we can, and considering the form adopted by the learned Judge in this case one must be guided by the sequence of legal considerations which affected his mind as set out in the heads of charge. We must bring our reason and common sense to bear upon the consideration of the document, and if we satisfy ourselves from a close inspection and examination of the record set forth by the learned Judge, that he properly directed the Jury in point of law, we must decline to interfere with the verdict of the Jury. Now in the headings of charge in the present case the Judge sets out the charges under which the prisoners were arraigned and the particular sections under which the prosecution was brought. He deals in sequence with every material section bearing upon the main charges coupled with the nature of the evidence given.

He keeps in sequence the section applicable to injury done to the immovable property distinct and separate from the other sections dealing with injury done to the person. He draws the attention of the Jury to how far intention and knowledge are essential ingredients in the commission of crime. He explains the nature of the joint act where more than five persons are involved in the commission of the joint wrong, and, taking the whole of his direction as embodied in the heads of charge,

1. (1907) 34 Cal. 698.

2. (1909) 36 Cal. 281=1 I. C. 970.

3. A. I. R. 1914 All. 207=21 I. C. 686.

we are satisfied that he directly brought to the Jury's mind every matter and legal consideration having regard to the evidence that was necessary for the Jury to know and to understand. While I fully admit that in the form in which he has prepared his heads of charge they are not as full and as satisfactory as they might be, nevertheless, reading them and considering them and giving them an intelligent and reasonable construction, I have no doubt that in substance he discharged his duty to the Jury and gave them a full and detailed direction in law and amply sufficient for them in considering the evidence for and against the prosecution. This disposes of the first and main ground in the argument addressed to us. The second objection that is taken is, that the Judge, in addressing the Jury as to the evidence or the value of the evidence of the two peons who were called as Court witnesses, was unfair, inasmuch as, it is alleged, he made a suggestion to the Jury in considering and weighing the evidence of these witnesses, that was not warranted by the evidence, and that thus he was unfair to the defence. The actual words used were as follows:

"Are you prepared to accept that story, or would you consider it as more likely that if the peons went to the village at all, they left it at least as early as midday?"

At first I was under the impression on Mr. Sinha's opening of this case, that that was a mere suggestion by the Judge not warranted by the facts, but that impression which I formed, rapidly dissolved when, I came to consider and weigh the evidence of the two peons themselves. I think it is abundantly clear on the evidence of these two peons, that they were merely pawns in the hands of Eknath Sahay, who did his bidding and took instructions from him and in whose house they stayed. It was manifestly clear that this suggestion which the Judge did make was one which might be made with every show of reason and with justice. The story told by these peons is an incredible story, and in testing the truth of the evidence which they gave, one cannot leave out of consideration the fact that these witnesses are in no sense disinterested parties, but are pledged up to the hilt as witnesses for the defence. The suggestion made by the Judge was not in violation of the evidence but was consistent with it, and was obviously given to the

Jury as a reasonable means of reconciling the conflicting cases of the prosecution and the defence. On this ground we likewise consider there is no reason for our intervention. Ground 3 alleged for challenging this conviction is that in reference to the alibi defence of prisoner No. 2, Bissessar Dayal. This gentleman is a law student, 27 years of age, and a School Master at Bahr. He produced evidence for his defence on the trial that he was in attendance in discharging his academical duties at the School on 10th September the day that the outrage was committed, and that, therefore, he did not take part in the unlawful assembly which was organised by his father. The Judge accurately and carefully set out the evidence in support of this prisoner's alibi, and the misdirection relied upon is, in telling the jury that there was no application by the prisoner for cancelling the last two days of his leave, he having been given leave from the 6th for 6 days, inasmuch as the Head Master stated that there was no register kept for recording rescinded leave. As I have said at the beginning of my judgment a Judge is not bound to discuss every little particular and detail of the defence. His duty is, and no more than this, to direct the jury's attention to the salient features of the case.

The omission of the Judge in not stating that the Head Master stated no register was kept for recording rescinded leave, was entirely immaterial to the main matter of defence which the prisoner wanted submitted to the jury, and I am satisfied that the Judge was not necessarily bound to so inform the jury, and that if he did not, his omission would not involve such irregularity as would amount to a failure of justice. Likewise on this heading we think there is no ground for our interference. I think the Judge, in his conduct towards this second prisoner, exercised a masterful forbearance, because had he so wished there was ample justification for saying and suggesting to the jury that the entry of his attendance in the register on 10th September was a fraudulent concoction. But without making any suggestion in disparagement of the alibi this prisoner gets, so far as the Judge is concerned, the most favourable consideration for his defence.

The 4th ground alleged of misdirection, is that the Judge kept back Ex. 15, a letter written by the Head Constable to a superior officer on the evening of 10th September, and did not contrast it with the contents of the first information made by the complainant and referred to as Ex. 3. It is solemnly suggested that because the constable, who had only come upon the scene about 6 o'clock, did not record in the letter that he wrote to his superior officer the incidents of looting, burning of property and plunder and injury to women, all matters referred to in the first information made by the complainant, that the Judge should have stated or told the Jury either that the constable did not see anything at all, or that the information contained matters that were not true. The constable only related what he saw, namely, a man lying dead, having been killed by a wound inflicted by a sword, and another man lying on the roadway gravely injured. In my view the learned Judge was quite right in not contrasting the letter of the constable with the evidence contained in the first information. It was not a document on oath, it was not a document for which the complainant was in any way responsible, it was nothing but the record of what the policeman himself saw, and it would be obviously improper to utilise that letter contrasted with the first information made, either as effecting the bonafides of the policeman or the justice of the complaint made by the complainant. Thus on this ground we see no cause for our intervention.

The 5th ground that has been alleged for challenging this verdict is, that the Judge did not state to the jury the substance of the medical evidence in so far as it showed that Ram Lal Rai's stomach was empty of human food, it having been proved by his son that he and his father had had their breakfast about 11 o'clock, and that thus, having regard to the ordinary period of digestion, death must have been caused at an hour different to that alleged by the prosecution, coupled with the additional fact that when the constable arrived upon the scene at 6, blood was seen oozing from the wounds of the deceased. The Judge himself says that he directed the Jury's attention to the medical evidence. The doctor's deposition was put in evidence, the Jury had it or its substance before them, and even

though the doctor was submitted for cross-examination by the defence he was not asked a single question or cross-examined by the defence as to this alleged ground for asking us to intervene. The entire argument is based upon speculation, and we see no ground whatsoever for impugning this verdict on any such frivolous pretext.

The 6th ground of misdirection that is alleged is, that the Judge should have pointed out the improbability of the case for the prosecution, that Eknath sent the letter to the Police on the morning of 10th September warning them that there was likely to be a disturbance and requiring their aid. It appears that the Government Prosecutor in stating the case to the Jury said that Eknath was the author of the letter alleged to have been written by the peon to the Police. At first I thought, that if that statement was made and was manifestly untrue, it might have affected the Jury's mind, but I am satisfied on reading the evidence of the peons that the Judge would not have been warranted in fact or law in making any such statement to the Jury as it is suggested he ought to have made. The bringing into existence of this letter was entirely the work of Eknath, and the peon was his willing implement to carry out his purpose and object, whatever they may have been. No doubt, he did not write the letter physically, but it was the creation of his brain, and thus there was no earthly reason why the Judge should tell the Jury that it was an improbable story that Eknath should have sent that letter to the Police on the evidence that was before the Court and Jury. Likewise we see no ground for our intervention in respect of this alleged misdirection.

The 7th is the next ground of objection, and it is stated that the Judge should have drawn the attention of the Jury to the time when it was recorded that the Police received the peon's letter at 3 p. m. on 10th September, when it is alleged that the letter was sent at 6 a. m., on that morning and delivered at the police barrack 7 miles away at 9 a. m.; and that by reason thereof, the conduct of the police was so malicious and suspicious as to amount to evidence of collusion on the part of the police with the Rajputs coupled with the fact that the police Inspector when he came to Dhodhochak to investigate this outrage stayed at the

kutchery of the accused's greatest enemy. I see no evidence of collusion or suspicion on the part of the police in carrying out their investigations in this case. If charges of this kind are to be made against public officials must they be made on evidence warranted to support them; and it is the merest pretence to suggest that the police were involved in collusion with the Rajputs as to the incidents connected with this outrage. There is not a shred of legal evidence to justify it, and in my opinion, it is wholly unwarranted; nothing but vain and unfounded suspicion. But probably the most effective answer to it is to be found in the petition for bail sworn by the accused Eknath himself, Ex. 4, Cl. (1) wherein, while suggesting collusion, no attempt is made to impeach the conduct of the police, and collusion is only alleged as against the arch-enemy of Eknath, Ram Hari. In my opinion the Judge was perfectly right in not telling the jury that they should draw the inference of collusion on the part of the police for the reasons stated. Therefore on this ground we see no cause for our interference.

The eighth ground of misdirection alleged is, that the Judge should have told the jury that it was unlikely that Eknath should injure his own property, he having become the purchaser of Ram Lal Rai's house and property under the decree in the bond suit which he had obtained against him, and that, therefore, it being his own property, in no sense could it be said that even if he did injure it he was guilty within the meaning of the term "mischief" as defined by S. 425, I. P. C. However it is not necessary to labour this matter, because the jury have acquitted the accused of having unlawfully assembled to do mischief. But irrespective of that I can see no misdirection by the learned Judge whatsoever on this aspect of the case, because I think he fairly and fully put before the jury every matter that was necessary and proper in support of the defendants' case and I think it is quite impossible to support this contention as a ground of interference by us. Now I come to ground No. 9, which deals with the important question of motive, and on this aspect of the case Mr. Sinha pressed us very strongly that the Judge has been guilty of great unfairness in his discussion with

the jury on the question of motive. On p. 2 of the heads of charge the Judge commences to set forth the various contentions put forward as to the motive that was suggested in this case, namely, whether the motive was stronger on the part of the Rajputs to make a false case against Eknath and his party, or was stronger on the part of Eknath to commit the crime. And whereas Mr. Sinha takes no objection to the first part, and indeed the major part, of the Judge's summary on the question of motive, but admits it is quite fair he objects to the concluding passage which runs as follows:

"Taking the litigation along with the examination of Eknath under S. 342, Criminal P. C., the jury will consider whether the feelings of the accused towards the Rajputs of Dhodhochak are friendly or hostile, if hostile, whether any argument as to what exact method would be likely to be taken by him in satisfying his grudge would have sufficient weight to enable them to reject the direct evidence."

This is the only part of the Judge's charge on the question of motive to which Mr. Sinha takes objection. The phraseology of this clause is not what one would have desired, it is obscure; but when analysed it means no more than this that the Judge told the jury that speculation as to the method by which Eknath might give effect to his feelings to satisfy his grudge against the Rajputs, if he had any, would not be sufficient to justify them in the rejection of direct evidence. If that is the meaning of this phrase, and I think clearly it is, then surely there is no misdirection whatsoever, because the Judge was obviously right in telling the jury that speculation as to motives in a man's mind, and the method by which he intends to put those motives into action, cannot override the direct evidence of established facts.

In our view we are clearly of opinion that this clause of the Judge's charge, which I have read out in extenso and which has been objected to so strongly by Mr. Sinha, is not in law any misdirection whatsoever. We cannot say whether the motive was stronger to make a false case than that Eknath should commit this crime. However that was a matter entirely for the jury and there was undoubtedly evidence to support the finding at which they arrived as a question of fact, and thus on this ground there is no cause for our interference. Undoubtedly the jury were entitled to take into considera-

tion the letter of Eknath to Somar for the purpose of showing the bent and tendency of his mind to drastic action. Ground 10 of misdirection that is alleged is that the Judge should have drawn the attention of the jury to the evidence of Chocha Rai Guru before the committing Magistrate, as to the evidence that he gave before him, when he omitted to state that he saw an assembled mob coming from Panwara on 10th September with Eknath at its head, and that he should have suggested to the jury that this omission on the part of this witness was sufficient to discredit the rest of his evidence. Why, one has to only analyse the facts to see the absurdity of this contention, because on the cross-examination of this witness when he is challenged upon this very matter, it appears he told the police two days after the commission of the crime the fact that he had seen the assembled mob coming to Dhodhochak on 10th September and ready for action, and that the reason that he did not mention it before the committing Magistrate was because he was not asked the question.

I think the Judge was not bound to refer to this alleged discrepancy in this witness's statement, because it is quite clear from his cross-examination that there was no ground whatsoever for impeaching his credit in this respect, and even if the Judge did not draw the attention of the jury to the evidence of this witness as given before the committing Magistrate and as given subsequently in the Sessions Court, it would not be an omission or error which would involve a failure of justice. Therefore we see no reason for our intervention on this ground. Ground 11, on which we are asked to set aside this verdict is, that the complaint was made so tardily after the commission of the crime, that it was evidence on which the jury might find that the complaint itself was not bona fide. And it was suggested that the Judge was wrong in not telling the jury that the complainant took no step to make his complaint to the police till they arrived at the village of Dhodhochak at 6-15. I cannot see that there was any tardiness in the making of this complaint, taking all the circumstances into consideration, the hour, the surrounding conditions, the condition of riot that must have existed during the occurrence and for some time after, and the fact that the police barrack

was seven miles away, point conclusively to the result that there was no undue delay on the part of the complainant in giving information to the police as to the incidents that had taken place. The moment the police arrived on the scene, there and then the complaint is made and at 6-15 on the day of the outrage the officers of the law are put in motion by the complainant. We cannot see that there was any delay or that the Judge would have been warranted in telling the jury there was such delay as would have impressed the complaint that was made with a false character.

The twelfth ground that is alleged is, that the absence of the female members of the complainant's family from their house on the day of the outrage showed a premeditated design on the part of the Rajputs to put up a fight. I do not agree with this inference at all. I think Ram Lal knew execution and attachment of his property was to take place on that day, and that no doubt with a view of defeating an attachment the female members of his house left with such personal belongings and chattels as they were capable of taking with them from the wreck, but the absence of the females of this household does not at all warrant the assumption that their absence was indicative of the Rajputs as aggressors. We see no ground for our interference in this respect. Ground 13 of misdirection is, that the Judge should have told the jury or directed their attention to the unlikelihood of Eknath retaining 4 of the cattle that were stolen while disposing of all the rest of the booty and plunder. I do know from the evidence set out in the heads of the Judge's charge that he deals with the question of cattle, that he puts forward the case for the prosecution and the defence and he invites the jury to express their opinion as to whether they believe the evidence of the Police Inspector as to having found 4 heads of cattle in the house of Eknath, or whether they believed the evidence of the Tikkadar. I think that was quite a proper direction and the Judge sufficiently reviewed the case to enable the jury to come to a right conclusion. Ground 14 of misdirection that is alleged is, that the Judge should have directed the jury's attention to the evidence of the Court witness 3, as to the ownership of the cattle. I have no doubt that this

witness's evidence was fully relied upon by the learned vakil on behalf of the defence, that all that could have been suggested in support of this witness's evidence was said, so far as it was calculated to support the defendants' case. But this witness appears to me wholly unworthy of credit. He is really a defence witness and in no sense a disinterested witness, and appears himself to have taken part as one of the mob in the incidents of that day.

However, I think the Judge was in no sense bound to have directed the jury's special attention to this witness's evidence, he having fully and carefully dealt with the salient and outstanding features of the general defence made for the prisoners in this aspect of the case. As to this and the previous ground the prisoners are in no way affected or prejudiced, because they have been acquitted of both charges in respect of which the facts alleged in this and the previous ground are applicable. Therefore on this ground also we see no ground for our interference. The 15th and last ground that is suggested of misdirection is, that the Judge did not call the attention of the jury to the respective dates when the witnesses were examined by the police. Between midday on the 11th September and 17th September there were no less than 21 witnesses examined, who made statements to the police as to what they had seen taking place in reference to the outrage that occurred upon the 10th September. 19 of the 21 were eye-witnesses to the occurrence itself. I think, to say that there was any laxity or want of care or want of expedition in preparing the case for the prosecution is without any foundation, and the Judge would not have been warranted in stating any such fact to the jury as is suggested, because in every particular the police proceeded with the preparation of their case as rapidly as human affairs will admit under the circumstances. The grounds alleged in 11, 12, 13 and 24 of the grounds set forth in the notice to appeal have been abandoned. I desire to quote the following passage from Lord Alverstone's judgment in the King against Stodhart, Second Criminal Appeal, p. 256, where he says:

"mere non-direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said, or that some-

thing was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively."

Judging by the test there laid down and from the general principles established by the innumerable cases that have been referred to, more especially by the dictum of Lord Halsbury as reported in *Bal Gangadhar Tilak v. Empress* (4) and *Empress v. Nimchand Mookerjee* (5), we are clearly of opinion that in this case there has been no misdirection by the learned Judge on any of the grounds suggested in the petition of appeal, nor has the Judge refrained from putting fairly and honestly before the jury the salient and prominent features of the case for the defence. I think it would be more desirable, in cases involving such gravity as the present one, that they should be tried by the Senior Judge in the District and not delegated to some Junior Additional Judge, who may not have the same extensive experience of criminal law and criminal trials as the Senior Judge. But we desire to add that no reflection of any kind can be made upon the learned Judge who tried this case nor upon the jury.

It remains to consider the propriety of the sentences which the learned Judge has thought fit to impose upon these five prisoners. In my judgment a man of the type of Eknath Sahay is a living and evil danger to any community. He has been sentenced to transportation for life and he has been fined a sum of Rs. 3,000 for causing grievous hurt to Ram Lal. Having regard to his age and also to the fact that it was not his hand that caused the death of Ram Lal we think the sentence is somewhat heavy. We shall, therefore, reduce in his case the punishment to one of transportation for 10 years and the fine of Rs. 3,000 will stand. As to his son Bissesser, the 2nd prisoner, he has been awarded transportation for seven years and a fine of Rs. 1,000. In his case we shall moderate the sentence to one of five years' rigorous imprisonment and the fine will stand. Ram Lal Goala is the 3rd prisoner. His was the hand and by his deed Ram Lal's life was taken, because it is established that he was seen giving a blow which of itself

4. (1898) 22 Bom 528=25 I A 1 (P C).

5. (1873) 20 W R 41.

was sufficient to cause death. He has been sentenced to transportation for life. There will be no change in the punishment awarded to him. Amrit Goala has been awarded transportation for life. He appears to have held down Ram Lal while the other man, the 3rd prisoner, struck him, a cowardly and shameful crime and, in my opinion, just as bad as the crime of the man who inflicted the blow which caused death. Therefore in his case there will be no change in the punishment awarded. Basudeo Goala, the 5th prisoner, appears only to have given one blow to Soma Rai. Fortunately his life was not taken, and he is still a living man. The crime was a dangerous one. We shall alter his sentence to one of 5 years' rigorous imprisonment.

Jwala Prasad, J.—I concur with my learned brother that it has not been shown that there was any misdirection in point of law, or that the case for the defence was not fairly and properly put to the jury. A careful scrutiny of the heads of the charge recorded under S. 367, Criminal P. C., will hardly fail to impress one that the learned Sessions Judge has explained to the jury the law applicable to the facts of the case, and has drawn the attention of the jury to all the salient facts raised in the defence of the appellants. We have given our best consideration to the arguments so ably advanced on both sides in this case and also to the evidence that has been brought to our notice in the course of the arguments. It is needless for me to repeat the reasons given by my learned brother to dispose of, *seriatim*, the various objections raised by the learned counsel for the appellant. It is sufficient to say that it has not been shown that the verdict of the jury was obtained on account of any misdirection by the Judge, or on account of their not having fully and sufficiently appreciated the law or the facts in this case. It is impossible to hold that the accused were in any way prejudiced, or that there has been a failure of justice in this case.

I also agree with my learned brother in the modification of the sentences passed upon some of the appellants.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 244

CHAMIER, C. J. AND JWALA PRASAD, J.
Adit Narayan Singh — Defendant—
Appellant.

v.

Mahabir Prosad Tewari—Plaintiff—
Respondent.

First Appeal No. 399 of 1914, Decided on 7th August 1916, from decision of Sub-Judge. Patna, D/- 29th May 1914.

(a) **Hindu Law—Succession—Mitakshara—Mother's paternal aunt's son and mother's sister's son's son—Preferential heir.**

Under the Mitakshara Law of succession the mother's paternal aunt's son is a nearer sapinda than the mother's sister's son's son. If they both stand in the same degree of propinquity, preference must be given to the mother's paternal aunt's son on account of his capacity to make offerings to ancestors of the deceased. *Cas. law discussed.* [P 248 C 2]

(b) **Ejectment—Proof of title—Necessity.**

A plaintiff suing in ejectment must, in order to succeed strictly prove his title. [P 245 C 2]

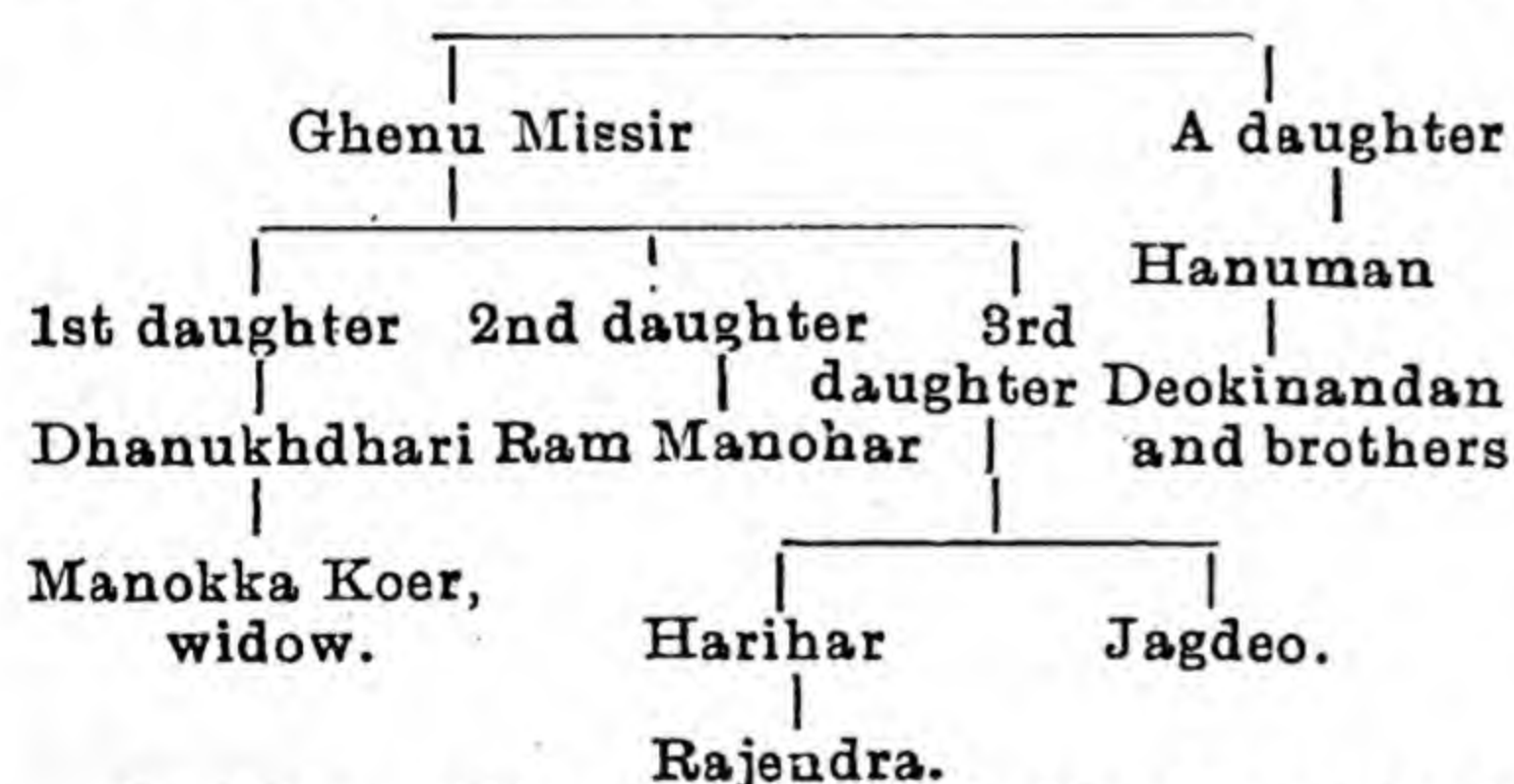
Pugh, Purnendu Narain Singh Bahadur and Siva Nandan Roy—for Appellant.

Manuk and Ganesh Dutt Singh—for Respondent.

Chamier, C. J. — This appeal arises out of a suit brought by the respondent for possession of a village, called Bariarpur in the district of Patna, which was formerly the property of one Dhanukdhari Misir. On the latter's death the village passed into the possession of his widow Monakka Kuer. She died in September 1902. At that time the appellant was in possession of the village under a *zar-i-peshgi ticca patta* which, he alleged, had been executed in his favour by Monakka Kuer. The Government appear to have been under the impression that there were no relatives of Dhanukdhari Misir alive and capable of inheriting his property. Accordingly a suit was brought in the name of the Secretary of State for India for possession of the village against the present respondent, who claimed to be entitled thereto under a will executed in his favour by Monakka Kuer. It was clear, and it is now admitted, that the respondent was not entitled to the village under that will, for Monakka Kuer had held the village as a Hindu widow. In that suit the respondent set up the title of one Gopal Missir, who was said to be one of the agnate relatives of Dhanukdhari. Thereupon Gopal Missir was made a defendant to the suit. The Subordinate Judge decreed the claim of the Secretary of State but on appeal the High Court

dismissed the suit, holding that it was proved that there were heirs of Dhanukhdhari capable of inheriting the property.

They declined to consider whether Gopal Missir had proved his agnatic relationship with the deceased. The Judges of the High Court in the course of their judgment suggested that Deokinandan might have a title to the estate as a bandhu of Dhanukhdhari. The respondent then purchased the rights of Gopal Missir and of Deokinandan and his brothers and brought the present suit. He alleged that the ticca patta, under which the appellant held the village, was not a genuine document and that the appellant was, therefore, a trespasser. It is now conceded, however, that the ticca patta was genuine and that the appellant was entitled to retain possession of the village until payment of the zar-i-peshgi. The Court below has found that the respondent is not entitled to the village as purchaser of the rights of Gopal Missir, as he has failed to shew that Gopal Missir is an agnate of Dhanukhdhari Missir. But it has found that the respondent is entitled to the village as purchaser of the rights of Deokinandan and his brothers. The following table exhibits the relationship between Dhanukhdhari and Deokinandan and his brothers and also between Dhanukhdhari and other persons who will be referred to in this judgment:



In his written statement the appellant put the respondent to proof of his right to possession of the village as purchaser of the rights of the heir of Dhanukhdhari (see paras. 5, 7, 8, 11, 15 and 23 of the written statement). He did not definitely set up the rights of any persons not a party to the suit, but nearly three years later he put in a petition in which he said that he had come to know that the heirs of Dhanukhdhari was one Raghunandan, the son of a sister of Dhanukhdhari. No issue was struck by the Subordinate Judge with reference to that

petition, and the petition may be disregarded inasmuch as it is conceded on behalf of the appellant that he has failed to prove the alleged right of Raghunandan. Mr. Manuk on behalf of the respondent has contended that in view of the fact that the respondent's name is entered in the khewat as proprietor of the village, while the appellant's name is entered in another part of the khewat as ticcadar of the village, the respondent is entitled to a decree for possession as against the appellant without proving that he is the person best entitled to the property, i. e., that he is the purchaser of the rights of the next heir of Dhanukhdhari. I cannot accept this contention. A respondent suing in ejectment must in order to succeed strictly prove his title. He must prove that he has purchased the rights of the next heir of Dhanukhdhari. As regards his purchase of the rights of Gopal Missir, I have nothing to add to the remarks made by the Court below. It appears to me that the respondent signally failed to prove that Gopal Missir is an agnate of Dhanukhdhari.

The question whether the respondent is entitled to succeed in virtue of his purchase of the rights of Deokinandan and his brothers requires more detailed examination. It is now common ground that Hanuman the father of Deokinandan survived Monakka Kuer. Hanuman is dead but his rights have devolved upon his sons. By cross examination of the witnesses produced by the respondent and also by evidence produced on his own behalf the appellant has endeavoured to prove that Ram Manohar, Harihar, and Jagdeo shewn in the above pedigree survived Monakka Kuer. The Subordinate Judge disposed of this question in a few lines. He said:

"The next point to be considered is whether Hanuman Tewari father of Deokinandan and his brothers, was heir of Dhanukhdhari when Monakka Kuer died There can be no doubt that Hanuman was a bandhu of Dhanukhdhari Missir; the learned vakil for defendant 1 did not deny that Hanuman was a bandhu but maintained that some nearer bandhus (i. e., daughters' sons of Ghinu) were alive when Monakka died; there is no positive proof to shew that any nearer bandhu was alive when Monakka died."

The evidence that Ram Manohar, Harihar, and Jagdeo survived Monakka Kuer, is of the most meagre description. The respondent said:

"Ghinu had three daughters one was married to Dhanukhdhari's father, another to Raj Dewal Tewari whose son was Ram Manohar. Ram Manohar is dead but I cannot say if he died before or after Monakka. The sons of the third daughter are Harihar and Jagdeo. I cannot say if they are alive on this day or not. I cannot say if Jagdeo is alive. I have not seen Harihar Pande."

Deokinandun, P. W. 3, said that Ram Manohar had died four or five years before 1914, that he did not remember if Jagdeo was a relative of Ghinu and that he had seen no other nathi of Ghinu except Ram Manohar. Witness 4, Fenangi Lal, a patwari said that the respondent performed the shrad ceremony of Monakka and that Ram Manohar and Harihar were invited as relatives of Dhanukhdhari and that Harihar had no brother. He did not go on to say that either Ram Manohar or Harihar attended the ceremony and he said that he had not seen Ram Manohar for 15 or 16 years. Witness 8 Dhanukhdhari Singh said that Ram Manohar, Ghinu's daughter's son died 13 or 14 years ago. He (the witness) had never seen Harihar but had heard that he died 20 years ago. Witness 9, Chanchal Missir said that Ram Manohar was a nathi of Ghinu's and died 14 or 15 years ago and that Harihar, another nathi of Ghinu's, died 21 or 22 years ago. Witness 12 Lalji said only that Ram Manohar and Harihar were nathis of Ghinu. Witness 13 Ram Dhari said that Ram Manohar died "8, 10, or 12 years ago" and he could not say how long ago Harihar had died. The appellant's witness Kokil Singh said:

"Manohar Harihar and Jagdeo were nathis of Ghinu Missir. Manohar and Harihar are dead. Jagdeo and Rajendra the son of Harihar are alive. Manohar died five or six years ago and Harihar seven or eight years ago."

A wasilbaki produced by the appellant himself for a totally different purpose, discloses the fact that Ram Manohar must have died in or before July 1901, for there is the following entry: "Sawan 1308 Fasli. Spent for cremation of Ram Manohar Missir Rs. 21." This shews that the appellant when ticcadar of the village advanced Monakka Kuer Rs. 21 on the occasion of the funeral ceremonies upon the death of Ram Manohar. The oral evidence quoted above shews clearly that Harihar died several years before Ram Manohar and that Jagdeo also died before Ram Manohar. The statement of a witness for the appellant

that Jagdeo is alive is an obvious falsehood for if he was alive he would have been produced. It is thus clear that the Subordinate Judge was right in finding that the appellant had failed to prove that another bandhu of Dhanukhdhari nearer in degree than Hanuman survived Monakka Kuer.

Both sides say, however, that Rajendra the son of Harihar is now alive. In fact both sides asked us to admit in evidence certain fresh documents, one of which was a copy of a plaint in a suit brought in 1914 for possession of this very village by a person claiming to be the purchaser of the rights of Rajendra. In that suit Rajendra was impleaded as a defendant. Rajendra and Hanuman are both five or according to Hindu lawyers, six degrees removed from Dhanukhdhari and therefore, the question is whether, upon the death of Monakka Kuer, Rajendra had a better claim to succeed to the property of Dhanukhdhari than Hanuman had. The above pedigree shews that Rajendra is the mother's sister's son's son of Dhanukhdhari while Hanuman is the mother's paternal aunt's son of Dhanukhdhari. Both are bhinnagotra sapindas or bandhus of the deceased. The order of succession among the more distant bandhus has been the subject of much controversy. According to the text of Manu, which is the foundations of all rules of inheritance in the Hindu law, "the property of a near sapinda shall be that of a near sapinda." The author of the Mitakshara after giving the rules for the succession of gotraja sapindas says: "on failure of gotrajas the bandhus are heirs." Bandhus are of three kinds—those related to the person himself, those related to his father and those related to his mother, as is declared by the following text:

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own bandhus. The sons of his father's paternal aunt, the sons of his father's maternal aunt must be deemed his father's bandhus. The sons of his mother's paternal aunt, of his mother's maternal aunt and the sons of his mother's maternal uncle must be reckoned his mother's bandhus. Here by reason of near affinity the bandhus of the deceased himself are his successors in the first instance, on failure of them his father's bandhus or if there be none, his mother's bandhus. This must be understood to be the order of succession here intended."

It has been held by the Privy Council that the word bandhu in this passage means a relation belonging to a different

family but united by sapinda relationship, and that the passage was not intended to be an exhaustive enumeration of all bandhus capable of inheriting but to illustrate the author's proposition that there are three kinds or classes of bandhus, viz., the atma-bandhus, the pitri-bandhus, and the matri-bandhus: see *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (1). Messrs. West and Buhler in their work on the Hindu law, Edn. 3, p. 491, say:

"Regarding the order in which the bhinnagotra sapindas succeed each other it is difficult to speak with certainty. It would seem, however, that the nine bandhus mentioned ought to be placed first if effect is to be given to the principle of the Mayukha that incidental persons are placed last."

The author of the *Smriti Chandrika* seems to suggest the same view: See *Krishnasawmy Iyer's Translation*, p. 197. If this view is correct Hanuman must be taken to exclude Rajendra in the present case, as Hanuman being the deceased's mother's paternal aunt's son is expressly mentioned while the mother's sister's son's son is not. Dr. Jolly in the *Tagore Law Lectures for 1883* at p. 215 points out that this view has the effect of excluding the maternal uncle who is obviously a nearer bandhu than his son who is expressly mentioned. Messrs. West and Buhler in another passage say that as it is finally settled that the mention of the bandhus in the *Mitakshara* is not exhaustive, the rule does not give precedence to any one enumerated over others nearer to the propositus in the same line of connection. The decision of the Privy Council in *Girdhari Lal Roy v. Bengal Government* (2) and *Muthusami Mudaliyar v. Simamhedu Muthukumaraswamy Mudaliyar* (3) affirms the correctness of this. This view does not assist Rajendra, for he is not nearer to the propositus in the same line of connection than any one expressly mentioned but is one degree further off. Pandit Raj Kumar Sarvadhikari takes the bandhus specially named in the *Mitakshara* as indicating the three principal classes of bandhus and not as embracing only the nine bandhus specially named. He discusses at length the position of the mother's paternal aunt's son and decides that he should be preferred to the mother's sister's son's son

and others both because he is nearer in degree and because he is the deceased's own bandhu.

Dr. Jogendra Nath Bhattacharya (p. 460) also prefers the mother's paternal aunt's son to the mother's sister's son's son. Mr. Trevelyan (pp. 390 and 393) prefers the mother's sister's son's son to the mother's paternal aunt's son. He regards the former as an atma-bandhu and the latter as a pitri-bandhu. He cites the case of *Bai Vijli v. Bai Prabhakshmi* (4), in which a mother's sister's son's son was preferred to the paternal grandfather's sister's son's daughter. The decision in that case appears to have no bearing upon the question which we have to decide, except that the Court held that the mother's sister's son's son was an atma-bandhu. The decision avowedly rests upon the decision in the case of *Chamanlal v. Ganesh Moti Chand* (5) where, however, the question for decision was different, namely, whether a mother's sister's son being an atma-bandhu named in the *Mitakshara* had a better claim than the father's father's sister's son who is named as a pitri-bandhu. In *Krishna Ayyangar v. Venkatarama Ayyangar* (6) a father's sister's daughter's son was held to be an atma-bandhu and as such entitled to succeed in preference to the paternal grandfather's sister's son who was a patri-bandhu. The Madras High Court seem to have held in this and some other cases that the descendants of atma-bandhus named in the *Mitakshara* are also atma-bandhus and that the descendants of a father or mother should be preferred to the descendants of a grandfather or grandmother, on the principle of the nearer line excluding the more remote.

There is thus an extraordinary diversity of judicial and other opinion on the meaning and application of the text of the *Mitakshara* quoted above. After giving the matter my best consideration, I have come to the conclusion that as the enumeration of the bandhus in the text is illustrative only and not exhaustive the text should be read in such a way as to give effect to the guiding principle of the Hindu law of succession that the inheritance belongs to the

1. A I R 1914 P C 1=25 I C 290=42 Cal 384=41 I A 290 (P C).

2. (1867-69) 12 M I A 448=10 W R 31 (P C).

3. (1896) 19 Mad 405=23 I A 83 (P C).

4. (1907) 9 Bom L R 1129.

5. (1904) 28 Bom 453.

6. (1906) 29 Mad 115.

nearest sapinda, and there seems to me to be no difficulty in doing so. If each of the bandhus expressly mentioned in the text is held to include his descendants, or (which is much the same thing) the descendants of an atma-bandhu expressly mentioned are held to be themselves atma-bandhus and are entitled to succeed in preference to all the pitri or matri-bandhus expressly mentioned, it may easily happen that an obviously more remote sapinda will exclude a nearer sapinda. In the recent case of *Buddha Singh v. Laltu Singh* (7), their Lordships said:

"As pointed out in the case of *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (1), the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest sapinda. The right of collaterals, therefore, is dependant on the existence of the sapinda-relationship between the propositus and the claimant. It is now well settled by the decisions of this Board that under the Mitakshara, the sapinda relationship arises between two people through their being connected by particles of one body, viz., that of the common ancestor, in other words, from community of blood in contradistinction of the Daya-bhaga notion of community in the offering of religious oblations. But as will be shown later on, the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood. Now it is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda-relationship, or community of blood, in judging of the nearness of blood relationship or propinquity among the gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations. In the case of *Bhyah Ram Singh v. Bhyah Ugar Singh* (8) the Board affirmed this rule in the following words: when a question of preference arises, as preference is founded on superior efficacy of oblation, that principle must be applied to the solution of the difficulty."

These remarks were made in the case of a dispute between agnates but they seem to apply as well to the case of bandhus. As regards connexion by particles of the body of the common ancestor, Hanuman was nearer to the common ancestor of the deceased and himself than Rajendra is to the common ancestor of the deceased and himself, while as regards the benefit to be conferred upon the deceased by offerings made by Hanuman and Rajendra respectively, it will be seen

that Hanuman made offerings to the maternal great-grandfather and maternal great-great-grandfather of the deceased while Rajendra cannot make offerings to any ancestors of the deceased.

It appears to me that Hanuman was according to the Hindu law a nearer sapinda of the deceased Dhanukhdhari than Rajendra is, and that if they both stand in the same degree of propinquity preference must be given to Hanuman on account of his capacity to make offerings to ancestors of the deceased. I would hold that the respondent by virtue of his purchase from Deokinandan and his brothers acquired the rights of Hanuman, who was the person entitled to the property on the death of Monakka Kuer. I would therefore dismiss the appeal with costs.

Jwala Prasad, J.—I entirely agree with the learned Chief Justice. It has not been proved that Gopal is an agnate of the deceased Dhanukhdhari or that Ram Manohar, Harihar and Jagdeo survived Mt. Monakka Kuer, widow of Dhanukhdhari. The crucial point in this case is whether Rajendra or Hanuman was the preferential heir of Dhanukhdhari Misir when the Mussammatt died. Rajendra is the mother's sister's son's son of Dhanukhdhari. Hanuman is the mother's paternal aunt's son. Both of them are bandhus, who have a right to succeed on failure of gotraja. The Mitakshara gives a list of nine persons as bandhus dividing them into three classes, atma-bandhu, pitri-bandhu and matri-bandhu. The mother's paternal aunt's son is mentioned there as a matri-bandhu. This will be Hanuman. Mother's sister's son is mentioned as atma bandhu. This will be Rajendra's father Harihar. Rajendra is not mentioned. If the list of the heritable bandhus in the Mitakshara is exhaustive or if those not mentioned there are to succeed on failure of those expressly mentioned, then the matter would have been very simple as in either case Hanuman, being expressly mentioned, would exclude Rajendra, who is not mentioned in the list. But it is settled now that the list is not exhaustive but only illustrative. Mr. Pugh contends that Rajendra is a son of an atma-bandhu mentioned in the list and must succeed in preference to Hanuman, who is a matri-bandhu. No case has been cited before us where the contest was between relations such as

7. A I R 1915 P C 70=30 I O 529=37 All 604 =42 I A 208 (P O).

8. (1869-70) 13 M I A 373=14 W R 1 (P O).

those concerned in this case. The matter has to be decided therefore upon the principles of succession mentioned in the text and recognized by the case-law on the subject. Among bandhus the right of inheritance is confined to bhinna-gotra sapindas. "Sapinda" has been used in the Mitakshara, verse 3, S. 5, in the sense of connexion by particles of one body. In the case of succession through females sapinda-relationship is confined to five degrees including the propositus. Another limitation is that the propositus and the claimant must be sapindas to each other. Applying the test of community of particles of the body of the common ancestor, Hanuman is third in descent from the common ancestor of himself and the propositus, whereas Rajendra is 4th in descent from the common ancestor of himself and the propositus. Hanuman therefore has a preferential right to succeed to the property.

Even supposing that Rajendra and Hanuman stood in the same degree of relationship or nearness to the deceased, preference would be given to Hanuman for he would offer religious oblations to two ancestors of the deceased, whereas Rajendra would offer to none, for cakes are offered only to three ascendants of the mother. I have refrained from discussing in detail the text or the authorities bearing on the subject, as they have been sufficiently dealt with by the learned Chief Justice. Reference may however be made to the Privy Council rulings in *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (1), *Babu Lal v. Nanku Ram* (9) and *Umaid Bahadur v. Udoi Chand* (10). There can, I think, be no doubt that Hanuman was entitled to succeed to the property in suit after the death of Dhanukhdhari's widow in preference to Rajendra. Deokinandan and others, sons of Hanuman therefore succeeded to the property after their father's death. The plaintiff therefore acquired a good title to the property by virtue of the kobala executed by Deokinandan and his brothers. The plaintiff's suit has been rightly decreed by the first Court and I agree that the present appeal should be dismissed with costs.

V.S./R.K.

Appeal dismissed.

9. (1895) 22 Cal 339.

10. (1881) 6 Cal 119.

A. I. R. 1916 Patna 249

MULLICK AND KINGSFORD, JJ.

Ram Narain Singh—Defendant—Appellant.*Ram Kumar Lal Bhagat*—Plaintiff—Respondent.

Second Appeal No. 145 of 1913, Decided on 2nd May 1916, from a decision of Judicial Commissioner, Chota Nagpur, D/- 19th August 1912.

Transfer of Property Act (4 of 1882), S. 82 — Mortgagee purchasing equity of redemption — Purchaser of portion of mortgaged property is only liable to proportionate debt.

Part of a property under mortgage was sold to the defendant by the mortgagor and the equity of redemption in respect of all the mortgaged properties was subsequently sold to the mortgagee. In a suit by the mortgagee to enforce the mortgage:

Held: that, having regard to the terms of S. 82, T. P. Act, it was improper to order sale of the mortgaged property without fixing the proportion of the mortgage-debt chargeable on the property purchased by the defendant: 12 C W N 107, Ref. [P 249 C 2]

Susil Madhab Mullick and Pravash Chandra Mitter—for Appellant.

Jamini M. Mukerjee, Sarat Chandra Rai Chowdhry and Dharendra K. Rai—for Respondent.

Kingsford, J.—This is an appeal by defendant 8 from the order of the Judicial Commissioner, confirming the order of the Subordinate Judge decreeing the plaintiff's mortgage suit for sale of certain property. The suit was to enforce a mortgage-bond of the year 1896. Under that bond certain property, including a house in Hazaribagh, was pledged by the mortgagor. Defendant 8 purchased half of the house from the mortgagor in the year 1904. In 1905 the four mortgaged properties were conveyed by the mortgagor to the mortgagee, that is to say, in the case of all the properties there was a conveyance of the equity of redemption. The order of the lower Court is contested on the ground that, under the terms of S. 82, T. P. Act, the appellant is only liable to contribute rateably towards the satisfaction of the mortgage bond. The order of the lower Court appears to be in contravention of the terms of S. 82. I think that, having regard to the terms of that section, it was improper to order sale without fixing the proportion of the mortgage debt chargeable on the house purchased by defendant 8. The manner in which such apportionment is to be made is laid down in the

case of *Jugdeo Sijngh v. Habibullah Khan* (1). In these circumstances the appeal is allowed with costs and the case remanded to the lower Court, with the direction that the necessary apportionment be made and the case disposed of according to law. The lower Court may, if necessary, remand the case to the original Court for the purpose of taking that account and the parties will in that event be given an opportunity of adducing any further evidence that they may desire before the Court of first instance. The lower Court will then keep the appeal on its own file and call upon the original Court for a finding on the points indicated.

Mullick, J.—I agree.

V.S./R.K. *Appeal allowed.*

1. (1908) 12 C W N 107.

A. I. R. 1916 Patna 250 (1)

CHAMIER, C. J. AND JWALA PRASAD, J.

Jadunandan Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 16 of 1916, Decided on 3rd April 1916, from order of Sess. Judge, Gaya, D/- 2nd February 1916.

Criminal P. C. (5 of 1898), S. 239—Portions of stolen property found in possession of two accused acting in concert—Joint trial was proper—Penal Code (45 of 1860), S. 411.

Where part of a stolen property was found in the possession of one person and another part in the possession of another, and it was proved that both had been acting in concert and had joint control over the property:

Held: that their joint trial was not illegal. [P 250 C 2]

Mazharul Haque—for Petitioner.

Sultan Ahmad—for the Crown.

Judgment.—The applicant *Jadunandan Prasad* and a man named *Jugdeo* were convicted by a Magistrate of having dishonestly retained property stolen from the house of *Dr. Ibrahim*. The first point taken in revision is that the joint trial of these two men was illegal. But the facts found are that the two men were acting in concert in retaining and concealing property which had been stolen. The truth is that if the facts are as found both by the Magistrate and the Sessions Judge on appeal, there is no room for any question of law. Part of the stolen property was found in the possession of the applicant and another part was found in the possession of *Jugdeo*. If that had been all it would probably have been

illegal to try the two men together, but there is evidence, which has been believed by both the Courts below, that the two men were acting in concert and were in joint control of the stolen property. There is no ground for interference. The application is dismissed.

V.S./R.K. *Application dismissed.*

A. I. R. 1916 Patna 250 (2)

ROE AND JWALA PRASAD, JJ.

Mt. Sunder Koer—Petitioner.

v.

Emperor—Opposite party.

Criminal Revn. Petn. No. 102 of 1916 Decided on 18th May 1916, against judgment and order of Sess. Judge, Mozufferpur, D/- 2 3rd February 1916.

(a) Stamp Act (2 of 1899), Sch. I, Art. 35 — Schedule must be treated exhaustive — Agreement to lease not being mentioned requires no stamp.

The Schedule attached to the Stamp Act must be treated as exhaustive. [P 251 C 1]

An agreement for a lease whereby no rent is reserved and no premium paid or money advanced is not included in the Schedule and does not require a stamp. [P 251 C 1]

(b) Stamp Act (2 of 1899) S. 62 (b)—*Amaldustak* for seven years, no rent fixed, requires no stamp—Executant cannot be convicted under S. 62 (b).

An *amaldustak* for a term of seven years wherein no rent is fixed does not require a stamp and the executant of such a document cannot be convicted for failure to stamp it under S. 62 (b). [P 251 C 1]

Saroshi Charan Mitter—for Petitioner.

Sultan Ahmed—for the Crown.

Judgment.—The short point for decision in this matter is whether a document in the following terms is required to be stamped.

"*Amaldustak* dated the 11th October 1911.

"*Amaldustak* on behalf of *Mt. Sunder Koer*, widow of *Tulsi Ram*, *Thakur*, deceased, resident of mouza *Dowara*, *Chakla Nai Pergana Bisara*. "Whereas I, having made proposal for letting out in *thica patta* the shares in the following mouzas, my *milkiat* right, to *Mr. A. B. Fraser* the Proprietor, Manager and *am-mukhtar* of the *Motipur Concern*, for seven years from 1919 to 1925 *Faslis*, delivered possession and put him in possession thereof. It is desired that the said *thikadar* as *kashtkar* shall enter upon possession of the shares mentioned below and shall remain so till the term, and whereas considerable portions in the shares of the mouzas form the *zerayat* land some of which have been entered in the survey *khatian* and some of which have not been entered therein and I have also to point out to him the *asamiwar jama* and land, but it will take time and the time for taking possession is approaching. At present there will be delay in granting the *thica patta* and getting a *kabuliyat* executed. For this reason at present a *thica patta* could not be executed. Therefore by virtue of this *amaldustak*

I have put the said thikadar in possession of the zerayat land and the asamiwar shares aforesaid. I, having made correct test of the zerayat and asamiwar jama in the month of January 1912 shall execute a thica patta on the same jama and get a kabuliyat executed therefor and the patta and kabuliyat will be registered together. Therefore I have executed this amaldastuk for a term of seven years so that it may be of use when required.

"Details of Mouzas.

Touzi No.	Extent of shares.
1617	... 1-anna, 7-gandas.
1620	... 4 gandas.
1619	... 2-annas, 13-gandas, 1-kouri, 1-karat.

"Situate in mouza Bhagwat Tappa Bhatsala pergana Bisara."

It will be observed that in this document no rent is fixed. Art. 35, Sch. I, Stamp Act sets forth the classes of lease upon which a stamp is required;

"a lease including an under-lease or sub-lease and any agreement to let or sub-let (a) Where by such a lease, rent is fixed, and no premium is paid or delivered. (b) Where the lease is granted for a fine or premium or for money advanced and where no rent is reserved: (c) Where the lease is granted for a fine or premium or for money advanced in addition to rent reserved.

The schedule attached to the Stamp Act must be treated as exhaustive. An agreement for a lease whereby no rent is reserved and no premium paid or money advanced is not included in the schedule and does not, therefore, require a stamp. The conviction, therefore, of the executant of the document, which we have quoted, under S. 62 (b) Stamp Act must be set aside. We accordingly set it aside and direct that the fine, if paid, be refunded.

V.S /R.K.

Conviction set aside.

A. I. R. 1916 Patna 251

SHARFUDDIN AND ROE, JJ.

Mahomed Sadiq—Appellant.

v.

Khedan Lal—Respondent.

Second Appeal No. 3773 of 1913, Decided on 14th April 1916.

Possession—Suit—Trespasser—Karta representing joint family can sue to eject trespasser—Quaere—Whether karta can sue under Tenancy Act.

The head of a joint Hindu family under the Mitakshara Law represents the whole family in a suit for possession against a trespasser.

Quaere.—Whether the manager of a joint Hindu family can bring a suit representing the family under the Bengal Tenancy Act.

[P 251 C 2]

Chandra Sekhar Prasad Singh—for Appellant.

Naresh Chandra Singh—for Respondent.

Roe, J.—The facts of this case briefly are, that the plaintiff alleging himself to be the sole proprietor of a property purchased with his own money, sued the defendants for eviction from waste lands situated in that property. The learned Munsif found as a fact that the son of the plaintiff was entitled to an 8-annas share in the property. He, therefore, gave a decree to the plaintiff for an 8-annas share only of the property upon which the trespass had been made. In appeal to the District Court the learned Judge took from the vakil appearing for the plaintiff an admission that the property was not his by right of purchase, but that he, the plaintiff, was acting merely as a managing member for himself and his son. The learned Judge thereon made a decree that the plaintiff was entitled to a 16-annas share of the waste lands trespassed over. In appeal to this Court, it is argued, in the first place, that even supposing the admission of the plaintiff's vakil be accepted, no suit would lie by the managing member of a Mitakshara family as representative of that family in any case governed by the Bengal Tenancy Act; in the second place, it is urged that it was beyond the jurisdiction of the District Judge to permit without proper formality a complete change in the nature of the suit as made in the District Court.

Upon the first ground argued I am of opinion, that the decision of the Judicial Committee in the case of *Kishen Parshad v. Har Narain Singh* (1) is ample authority for the proposition that the head of a Mitakshara family is competent, in respect of all contracts which it is open to him to make on behalf of the family, to sue as managing member of the family. Suits under the Bengal Tenancy Act may, perhaps, be excluded from this general rule. On that I prefer not to express a definite opinion. But this present suit is not, as I read it, a suit under the Bengal Tenancy Act. It is a plain suit upon a tort suffered by a trespasser. Even if there had been no Tenancy Act, a suit would lie to eject a trespasser from the proprietor's private lands. The question whether private waste lands shall be held khas or settled is one for the managing member to decide. I see no reason why the managing member should not sue

1. (1911) 33 All 272=9 I C 739=38 I A 45 (P C).

when there has been an infringement upon the rights of the family to hold or settle its waste lands. Our attention has been drawn to the case of *Sati Prasad Garga v. Radha Natha Maity* (2). In that case it will be noted that Mookerji, J. found only that two members of a joint family could not represent the whole family. He reserved to himself a doubt as to whether the actual head of the family could, in a case such as the present case, represent the whole family. I am of opinion that in a case of trespass the head of the family should be permitted to represent the whole family. On the second contention raised on behalf of the appellant, that the plaintiff should not have been allowed to shift his ground in the District Court, I am of opinion that the merits of the case do not require us to say that the learned Judge exercised a discretion not vested in him by law. It would have been wiser perhaps if the position taken by the plaintiff had been solidified by the addition of the plaintiff's son to the record. I am not prepared to send back the case in order that this course may now be taken. I am satisfied that substantial justice has been done by the decree now made, and that there is no irregularity in the proceedings of the District Court such as should be held to vitiate the decree made. The appeal is dismissed with costs.

Sharfuddin, J.—I agree.

V.S./R.K. *Appeal dismissed.*

2. (1913) 18 I C 197.

A. I. R. 1916 Patna 252

SHARFUDDIN AND CHAPMAN, JJ.

Brajasunder Deb—Judgment-debtor—Appellant.

v.

Sarat Kumari—Respondent.

Appeals Nos. 141 and 142 of 1914, Decided on 4th December 1916.

(a) Civil P. C. (1908), O. 34, Rr. 4, 5, 14, and 15—Maintenance decree charging immoveable property—Property can be sold in execution—Transfer of Property Act (1882), S. 62.

A maintenance decree provided that the allowance decreed should be charged on certain immovable property:

Held: that the property could be sold in execution of the decree and there was no necessity to bring a separate suit for sale under S. 67.

[P 254 C 1]

(b) Civil P. C. (1908), O. 34, Rr. 14, and 15—Operation of R. 14 is confined to cases where mortgagee obtains personal decree

against mortgagor on mortgage debt—Transfer of Property Act (1882), S. 100.

Per *Sharfuddin, J.*—The operation of R. 14, O. 34, Civil P. C. is confined to cases where a mortgagee has obtained a personal decree against a mortgagor on a mortgage debt. In such a case the mortgagee is not entitled to bring the mortgaged property to sale in execution of the personal decree. He can have the property sold only by instituting a regular suit for sale and obtaining a decree for sale under Rr. 4 and 5 of that Order: 42 Cal. 780, Ref. [P 253 C 2]

Per *Chapman, J.*—The effect of Rr. 14 and 15, O. 34, Civil P. C., read with S. 100, T. P. Act, is that where immovable property has been made security for the payment of money and the beneficiary has obtained a decree for the payment of the money so secured, he shall not be entitled to bring the property to sale otherwise than by instituting a suit for sale in enforcement of the security. [P 254 C 1]

The object of the law is to secure to the debtor the rights which he has in the case of a decree for sale and which he does not have in an ordinary decree for money [P 254 C 1]

The decree referred to in R. 14 must be a decree subsequent to the creation of the security. [P 254 C 1]

(c) **Hindu Law—Maintenance—Widow—It can be enforced against transferee of estate.**

A Hindu widow and a Hindu daughter have a right of maintenance from the estate of the deceased husband or father, as the case may be, and any of them, in case of transfer, can enforce that right of maintenance against the transferee notwithstanding the transfer. [P 254 C 1]

(d) **Transfer of Property Act (1882), S. 100—Security—Kind of in S. 100 stated.**

The security referred to in S. 100 must be of such a kind as to enable a suit of the nature of a suit for sale to be brought to enforce it.

[P 254 C 2]

Provash Chandra Mitter, Satish Chandra Bose and Suresh Chandra Chakravarty—for Appellant.

Ram Chandra Mitter—for Respondent.

Sharfuddin, J.—These are two appeals against an order of the Subordinate Judge of Cuttack passed on 14th March 1914. on an application for execution of a decree passed by the High Court of Calcutta on appeal. It is necessary to reproduce in this judgment the ordering portion of the decree passed by the Calcutta High Court:

"It is ordered and decreed that the plaintiff do get from the defendant a maintenance allowance of Rs. 150 a month from 6th November 1905. She do also get Rs. 7,950 from defendant on account of arrears of maintenance for the period beginning from 26th November 1905 to 26th April 1910. It is further ordered that the plaintiff do get costs from the plaintiff (this is a misprint for defendant) and it is further ordered that the allowance decreed will be a charge on the property mentioned in the plaint."

The decree-holder applied for execution of the decree by attachment and sale of the property described as Killa Aul, which

is one of the properties mentioned in the schedule attached to the plaint, whereupon the present appellant filed an objection under S. 47, Civil P. C. on 25th September 1913, on the ground that the order of attachment was illegal inasmuch as the maintenance decreed by the High Court was made a charge on the properties mentioned in the plaint, and that the decree-holder was not entitled to bring the properties charged to sale otherwise than by a separate suit for sale in enforcement of the charge under S. 67, T. P. Act. The Subordinate Judge, on 14th March 1914, disallowed the objection and ordered that the execution should proceed. It is against this order that these present appeals have been preferred. On behalf of the appellant it was contended that under the decree of the High Court a charge having been created, the property could not be sold without first proceeding under S. 67, T. P. Act, 1882. That section provides:

"In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, ... a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property.

A suit of this nature is known as a suit for foreclosure. The appellant further relied on S. 99, T. P. Act. S. 99 provided that:

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67, T. P. Act."

Rule 14, O. 34 provides:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale...in enforcement of the mortgage."

It is clear, therefore, that an alteration has been made in the present Civil Procedure Code. In the case of *Tarak Nath Adhikari v. Bhubaneshwar Mitra* (1) I have pointed out the alteration and its effect made by R. 14, O. 34. In the present case, however, I propose to point out that this rule corresponds to S. 99, T. P. Act, except that the words "a claim arising under the mortgage" have been substituted for the words "any claim whether arising under the mortgage or not." The effect of this alteration is to

confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against a mortgagor on a mortgage debt. In such a case R. 14, operates and the mortgagee is not to be entitled to bring the mortgaged property to sale in execution of the personal decree. He can have the properties sold only by instituting a regular suit for sale and obtaining a decree for sale under Rr. 4 and 5 of this order. It is clear that where a mortgagee brings such a suit for sale and obtains a decree, what will be sold is the mortgaged property free from the mortgage, while in the other case where the suit is not for sale but on the mortgage debt only what will be sold is the mortgaged property subject to the mortgage, that is, it would be only the mortgagor's equity of redemption that would be sold. The object of the present rule is to prevent mortgagees from suing mortgagors on a mortgage debt as such and in execution selling the right of equity of redemption, thereby depriving the mortgagor of the right of redemption that he is bound to get by the decree for sale. There is no doubt that in the High Court's decree the word 'charge' has been used, but the question is whether the word 'charge' used therein is within the meaning of S. 100, T. P. Act. That section provides:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Ss. 81 and 82, ... shall, so far as may be, apply to the person having such charge."

The original suit which culminated in the High Court decree was a suit for maintenance only and not a mortgage suit, so the present claim of the decree-holder cannot be said to have arisen under any mortgage. I understand the word 'charge' in the High Court decree is intended for the purpose that the decree-holder may have a lien on the properties, if any of them happens to be alienated to purchasers with notice and the charge, therefore, is really not on the properties, but on the profits thereof. S. 39, T. P. Act, provides that:

"Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right

1. (1915) 42 Cal 780=30 I C 988.

may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

A Hindu widow and a Hindu daughter have a right of maintenance from the estate of the deceased husband or father, as the case may be, and any of them in case of transfer, can enforce that right of maintenance against the transferee notwithstanding the transfer. Various reported cases of the different High Courts of the country have been referred to by the parties, some of which are cases before S. 99 was repealed. I do not see it necessary to discuss those cases. The words of the law are plain, and we have to administer the law and whether that law is good or bad is not for us to decide, it is for the legislative body to do so. For the above reasons, I am of opinion that the objector's objection against execution was rightly disallowed by the Subordinate Judge. These two appeals are dismissed with costs.

Chapman, J.—I agree. Reading Rr. 14 and 15, O. 34, Civil P. C. with S. 100, T. P. Act, the law on the subject may be stated in the following terms. Where immovable property has been made security for the payment of money and the beneficiary has obtained a decree for the payment of the money so secured, he shall not be entitled to bring the property to sale otherwise than by instituting a suit for sale in enforcement of the security. The object of the law is to secure to the debtor the rights which he has in the case of a decree for sale and which he does not have in an ordinary decree for money. For the purposes of the present case there is one matter which requires elucidation. The expression in R. 14, is "decree for the payment of money in satisfaction of a claim arising under the mortgage" (or charge). These words make it clear that the decree referred to must be a decree subsequent to the creation of the security. In other words, the immovable property must have been made security for the payment of the money before the money decree was obtained, otherwise the provisions do not apply and the appellant has no case. I have, therefore, to decide in this case whether the immovable property was made security for the payment of the money before the money decree was obtained. It has been contended that

apart from and before the decrees the widow in one case and the daughter in the other were persons for whom the payment of money had been secured in the manner required, that is to say, that immovable property had in each case been made security for the payment of the maintenance before the decrees were obtained. But prior to the decree neither the widow nor the daughter had any right other than the right to receive maintenance from the profits of the immovable property left by Pitamber Deo so long as it remained in the family or was transferred gratuitously.

If the property had been transferred elsewhere for value, neither widow nor daughter would have had any remedy against the transferee unless she could have proved that he had notice that the property was being transferred to him with the intention of defeating the right to maintenance. It is only by a somewhat loose use of the word security that it can be said that the immovable property left by Pitamber Deo was made security for the payment of maintenance to the widow or the daughter before the decrees were obtained. It is clear, however, that the word security was not used in S. 100, T. P. Act, in this loose sense. Obviously in order to come within the terms of the section the security must have been of such a kind as will enable a suit of the nature of a suit for sale to be brought to enforce it. It cannot be said that until she has obtained a decree creating a charge a widow can realise her maintenance by a suit of the nature of a suit for sale. Much less can a daughter do so. Prior to the decree it was not a case of immovable property made security for the payment of money within the meaning of the section, but for the provision to apply it is necessary that the security should have been created before the decree. The learned Subordinate Judge rightly overruled the objection.

V.S./R.K. *Appeals dismissed.*

A. I. R. 1916 Patna 254

CHAMIER, C. J. AND JWALA PRASAD, J.
Tribikram Deo Narayan Singh —
Judgment-debtor—Appellant.

v.

Badri Missir — Decree-holder — Respondent.

Misc. Civil Appeal No. 16 of 1916, Decided on 29th May 1916.

Limitation Act (9 of 1908), Art. 183—When can High Court's order transmitting Privy Council decree for execution not operate as revivor explained.

A decree was passed by Her late Majesty in Council on 28th November 1899. On 2nd December 1907, the decree-holder applied to the Calcutta High Court under S. 610, Civil P. C., 1882, to transmit the decree for execution to the proper Court. On 4th February 1908, the High Court ordered notices to be issued to the opposite parties. On 10th August 1910, the High Court passed a formal order transmitting the Order in Council to the District Judge for execution. On 22nd January 1915, an application was made for execution of the decree :

Held : that there being nothing on the record to show whether the notices under S. 610 were in fact issued and served upon the parties, the order of the High Court transmitting the Order in Council to the District Judge for execution was not a revivor of the Order in Council within the meaning of Art. 183, Lim. Act, and therefore the application of 22nd January 1915 for execution was barred by limitation. [P 256 C 1]

Ganesh Dutt Singh, Rajendra Prasad and Baidyanath Narayan Singh — for Appellant.

Sarosh Charan Mitter and Awadh Behari Chandra — for Bespondent.

Chamier, C. J.—This appeal arises out of an application made to the Court to enforce an Order of Her late Majesty in Council dated 28th November 1899. It appears that several applications for enforcement of the Order in Council were made in the years 1902, 1903, 1904 in disregard of the provisions of S. 610, Civil P. C., 1882. The case came before the Calcutta High Court in November 1906 on appeal against an order made by a District Judge, and the High Court then pointed out that an application under S. 610, Civil P. C., 1882, was a necessary preliminary to the enforcement of the Order in Council. On 2nd December 1907, the person in whose favour the Order in Council had been passed, and whom we may refer to as the decree-holder, applied to the Calcutta High Court under S. 610, of the Code of 1882. On 4th February 1908, that Court ordered notices to be issued to all the opposite parties. The papers before us do not shew, and the learned vakils on both sides have been unable to ascertain, whether in fact notices were issued and, if issued, were served upon the parties referred to. On 15th August 1910, the High Court passed a formal order transmitting the Order in Council to the Court of the District Judge for execution. On 21st November 1911, the decree-holder applied for execution against the

widow of one of the judgment-debtors. Notices appear to have been issued to all the judgment-debtors. It does not appear whether they entered an appearance or not. All that is certain is that the objection put in by the widow was allowed and the application for execution was dismissed on 18th April 1913. On 22nd January 1915, an application for execution of the Order in Council was made to the Subordinate Judge to whom the execution proceedings had been transferred.

The judgment-debtors objected that the application for execution was barred by limitation, but the Subordinate Judge overruled the objection and directed that execution should proceed. The application for execution is admittedly governed by Art. 183, Sch. 1, Lim. Act, 1908, according to which an application to enforce an Order of the Sovereign in Council must be made within 12 years from the date on which a present right to enforce the order accrued to some person capable of releasing the right, provided inter alia that where the order has been revived 12 years shall be computed from the date of such revivor. The decree-holder in the present case contends, and the Court below has held, that the order of the Calcutta High Court dated 15th August 1910, transmitting the Order in Council to the Court of the District Judge for execution revived the order within the meaning of Art. 183. The meaning of revivor as used in this Article and in the corresponding Article of the Limitation Act of 1877 has been the subject of a number of decisions. The Courts seem to be generally agreed that in using the term revivor the Legislature had in view the procedure embodied in S. 216, Civil P. C., 1859, and S. 248, Civil P. C., 1877. The object of the procedure was to give notice so as to prevent undue surprise to a judgment-debtor where more than one year had elapsed between the date of the decree and the application for execution, or when it was sought to enforce the decree against representative of a party against whom the decree was originally made.

It has been held in several cases that where on an application for execution notice is issued under S. 216, Civil P. C., 1877, or S. 248, Civil P. C., 1882, and the Court has decided that the decree is

still capable of execution and makes an order for execution, there has been a revivor within the meaning of the Article mentioned above. In my experience it has not been the practice to issue notice on an application made under S. 610, Civil P. C., 1882, or O. 45, R. 15, of the present Code where no special directions are required. I have myself in many cases transmitted an Order of the King in Council to a Subordinate Court for execution without giving any notice to the judgment-debtors. It appears to me that where an Order in Council is transmitted to a Subordinate Court for execution without any notice being given to the judgment-debtors, it would be impossible to say that there has been a revivor of the order. In such a case the Court does not consider whether the order is still capable of execution or not. It leaves all such matters to be determined by the Court to whom the Order in Council is transmitted.

The only question to my mind is whether anything occurred in the present case to make the order of the Calcutta High Court, dated 15th August 1910, operate as a revivor of the Order in Council. The order on the face of it is a mere formality. It does not shew that any question was raised before or decided by the Court. It does not even shew that the judgment-debtors were present. The Court had no option but to transmit the Order in Council to the Subordinate Court for execution and as there is nothing to shew that it decided any question whatever in the case, I am of opinion that the order of the Calcutta High Court did not operate as a revivor of the Order in Council within the meaning of Art. 183, Sch. 1, Lim. Act. It follows that, in my opinion, the application for execution was barred by limitation and should have been dismissed. I would allow this appeal, set aside the order of the Court below and dismiss the application for execution with costs. Hearing fee four gold mohurs.

Jwala Prasad, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 256

MULLICK AND ATKINSON, JJ.

Kesho Prasad Singh—Plaintiff—Appellant.

v.

Jirdhan Ojha and others—Defendants—Respondents.

Appeals Nos. 3875 and 3885 to 3892 of 1914, Decided on 23rd November 1916, from appellate decrees of Sub-Judge, Shahabad, D/- 29th August 1914.

Bengal Tenancy Act (1885), S. 180—Char lands—Holding comprising of—Submersion—Occupancy rights can be acquired.

Part of the lands of the defendants' holding were char lands. They were submerged for long or short periods of time. Defendants had paid rent for the entire holding for over 12 years and had been in possession during that period:

Held: that the char lands did not by reason of their submersion cease to be held by the defendants or to form part of their tenancy or holding, and that the fact of their submersion did not destroy the right of the defendants to acquire occupancy rights therein.

[P 257 C 1]

Krishna Sahai and Susil Madhab Mullick—for Appellant.

M. Yunus and Nirsu Narayan Sinha—for Respondents.

Atkinson, J.—These nine appeals are analogous and the same judgment applies to them all. The nature of the suits are for ejectment against the defendants as tenants for overholding of char or deara lands. The plaintiff alleges that the char lands in suit were let or settled for a year with the tenants, and that the year having expired the tenants are liable to be ejected. The defendants' defence to that claim is:

"No, no doubt these are char or deara lands, but we have acquired in these lands, by virtue of S. 180, Ben. Ten. Act, occupancy rights, having held the same continuously for the period of 12 years."

The plaintiff admits that the lands are char lands, and are occasionally submerged—it may be for long or short periods of time—and he contends that even though the char land which may be submerged forms part of a tenant's holding, that by reason of its submersion it ceases to be held while submerged by the tenants, and that therefore qua that particular portion of the holding he cannot be said to have held continuously, and further cannot be said to have acquired occupancy rights therein. The tenants contend that the learned Munsif has believed their statement that they have paid rent for the entire holding for 12 years, which involves also that they

have been in possession upon the basis of the rent paid. The plaintiff in answer to that says:

"Oh, the rent you pay is only a rent in reference to the culturable portion of the land and not in respect of the entire."

The Munsif finds, and the learned Judge on appeal agrees with him, that the plaintiffs had not established their case; that they had not proved or showed that the rent paid was only in respect of the culturable portion of the lands I think from the point of view I take of the case and from the construction of S. 180 that that is the right view. It is admitted by Mr. Krishna Sahai for the plaintiff that the char lands did form part of the tenants' holding, and if they did form part of the tenants' holding, then the mere fact of their submersion does not destroy the right of the tenants to acquire occupancy rights therein. Part of the lands comprising the holding may have been submerged for long or short periods of time, but they do not for that reason cease to be held by the tenant or to form part of his entire tenancy or holding. It has been contended that the Judge wrongly placed the onus upon the plaintiff. I do not think he did. He was satisfied that the defendants had established their case, that they were paying rent for the entire holding, and that they had been paying the same for over 12 years and that the defendants had been in possession during that period. In my opinion the defendants discharged the onus placed upon them by law and that being so, the onus was shifted upon the plaintiff, who by no means satisfied the Court that the rents he had received from the defendants were in respect of the char lands only. Accordingly we hold that the lower Court was right in dismissing these suits, and we disallow the appeal with one set of costs.

Mullick, J.—I agree.

V.S./R.K.

Appeal disallowed.

A. I. R. 1916 Patna 257

SHARFUDDIN AND CHAPMAN, JJ.

Gopi Biswal and others—Petitioners.

v.

Ram Chandra Sahu—Opposite Party.

Civil Revn. No. 4 of 1916, Decided on 29th November 1916, from order of Collector, Cuttack.

1916 P/33 & 34

(a) **Orissa Tenancy Act (1913), S. 204 (2) (3)**—Deputy Collector deciding that no rent is payable—Appeal lies to District Judge.

Under Sec. 204 (3), Orissa Tenancy Act, an appeal lies to the District Judge from the decision of a Deputy Collector holding that no rent is payable to the plaintiff by the defendant for a sarbarakari tenure held by the latter. [P 258 C 1]

(b) **Landlord and Tenant—Agreement not to pay rent—Tenancy does not cease.**

Per *Chapman, J.*—A person does not cease to be a tenant merely because by an arrangement with his landlord he is released from the payment of rent. [P 258 C 1]—

Subodh Chandra Chatterji—for Petitioners.

Biswanath Sinha and Satya Narain Sen Gupta—for Opposite Party.

Sharfuddin, J.—The petitioners obtained the present Rule against the judgment and decree passed by the Collector, as to why they should not be set aside on the ground that the Collector had no jurisdiction to entertain and hear the appeal. The facts necessary to understand the present case are: The plaintiff purchased at a revenue sale a fractional share in a property bearing Touzi No. 2837. The defendants, who are now the petitioners are the proprietors of a four-anna share in a sarbarakari tenure included in the above touzi. The plaintiff instituted this suit in the Deputy Collector's Court for arrears of rent against the defendants on account of the said tenure. The defendants, on the other hand, contended that no rent was payable by them on the ground that by an arrangement with the plaintiff's predecessor-in-interest they never paid any rent for this sarbarakari tenure. On these facts the Deputy Collector framed an issue as follows: "Does the relationship of landlord and tenant exist between the parties?" The real meaning attached to the wording on the above pleadings is whether this sarbarakari tenure held by the defendants is liable to pay any rent or not. The plaintiff lost his suit before the Deputy Collector, as he held that there was no relationship of landlord and tenant between the defendants and the former zamindars and none can therefore, exist between them and the plaintiff, whereupon the plaintiff appealed to the Collector of the district. He gave a decree to the plaintiff on which the defendant came to this Court and obtained the present Rule.

The whole question hinges on the interpretation of S. 204, sub-S. (2) and (3) Orissa Tenancy Act. Sub-S. (2) runs thus:

In suits where the subject matter of the claim or dispute does not exceed Rs. 100 in value, and the judgment does not decide a question whether rent is payable for land or not, or a question relating to title to land or to some interest in land as between parties to the suit, the judgment of the Collector shall be final. Sub-S. (3) runs thus: — In suits other than those referred to in Sub-S. (2), an appeal from the judgment of the Collector or Deputy Collector shall lie to the District Judge, unless the amount or value in dispute exceeds Rs. 5,000, in which case the appeal shall lie to the High Court. The Deputy Collector decided that no rent was payable to the plaintiff by the defendant for sarbarakari tenure held by the latter. That being his decision, under Sub-S. (3), the plaintiff should have appealed not to the Collector of district, but to the District Judge. He having failed to do so and the learned Collector not having jurisdiction to entertain the appeal, the Rule must be made absolute. The judgment and decree passed by the Collector are set aside and the Rule made absolute.

Chapman, J.—I agree. The plaintiff who appealed to the Collector was no doubt misled by the manner in which the Deputy Collector framed the issue. The Deputy Collector overlooked the definition of the word "tenant" in the Orissa Tenancy Act. A person does not cease to be a tenant merely because by an arrangement with his landlord he is released from the payment of rent. Let the memorandum of appeal be returned by the Collector for presentation to the District Judge.

V.S./R.K.

Rule made absolute.

A. I. R. 1916 Patna 258

CHAMIER, C. J. AND SHARFUDDIN, J.

Dehu Ghunya — Plaintiff—Appellant.

v.

Barabihira Debi—Defendant—Respondent.

Letters Patent Appeal No. 47 of 1916, Decided on 22nd November 1916.

Practice—Relief—Several reliefs claimed—Failure to prove—Plaintiff is entitled to decree for relief proved.

A plaintiff who claims one kind of relief and fails to establish his right to it is not entitled to relief of a wholly different kind, but in a case in which a plaintiff claims two reliefs, one of which he is clearly entitled to and the other he has failed to prove himself entitled to, the former relief must be decreed to him. [P 259 C 1]

Plaintiffs sued for possession of a tank and for a declaration that they had a permanent and heritable right therein. They proved their right to possession of the tank but failed to establish their right to the declaration asked for by them:

Held: that they were entitled to the decree for possession of the tank, notwithstanding their failure to prove the additional relief claimed by them. [P 259 C 1]

Lalmohan Ganguly—for Appellant.

Monuk and Sailendra Nath Palit — for Respondent.

Chamier, C. J.—The appellant's case as stated in their plaint was that their ancestors had held possession of the tank in suit for many years previous to 1266 Fasli, that in the year just mentioned their ancestors were confirmed in possession of the tank as tenants by means of a patta on their entering into an agreement to pay a jama of Re. 1 annas 2 a year and a quarter of a seer of ghee, that from 1266 Fasli till 1318 Fasli the appellants had been in possession and enjoyment of the tank, had stocked it with fish and caught fish in it in virtue of a mourusi, istimrari, kayemi right on payment of the said rent, that in 1318 Fasli the respondents forcibly dispossessed the appellants of the tank, and that it was in that year that a cause of action for the present suit accrued to them. On the basis of these allegations the appellants prayed for a decree for khas possession of the tank with a declaration of their istimrari, mourusi, kayemi right therein. Other reliefs were claimed which are not now of any importance. The Munsif gave the appellants a decree for possession and declared their right in the terms above stated. One of the respondents appealed and the Subordinate Judge allowed the appeal in part and eliminated from the Munsif's decree the words istimrari, mourusi and kayemi. The Subordinate Judge said that the appellants had produced a number of old dakhilas and other papers in support of their title but that those documents did not prove that the appellants had a permanent right in the tank. He was not prepared to accept a certain award of arbitrators which had been accepted by the Munsif. With reference to the patta of 1266 Fasli mentioned in the plaint, the Subordinate Judge said:

"The next document of importance is a patta dated 27th Magh 1266 Fasli, which mentions seven tanks one of which is Thakur tank (the tank in suit) and the rental is stated to be Re. 1 annas 2. It clearly shows that only a fishing right was given to the tenant. It does not purport to be a permanent lease."

Later in his judgment the Subordinate Judge said:

"I agree with the learned Court below in thinking that plaintiffs have succeeded in proving their long possession of the disputed tank, but I find no evidence to prove that they have any right to the tank, other than that of fishing in it as tenants and I hold that they have failed to prove any permanent title to the tank itself."

Accordingly he modified the decree of the Munsif as explained above. The defendant filed a second appeal to this Court. The learned Judge who heard the appeal was of opinion that inasmuch as the appellants had failed to prove that they were entitled to the declaration which they asked, their suit should have been dismissed and he referred to cases which establish that if one kind of relief is claimed and fails, the plaintiff is not entitled to relief of a wholly different kind. I am unable to agree with the learned Judge of this Court. The first and most important relief claimed by the appellants was a decree for possession of the tank. The appellants wished to have coupled with the decree for possession a declaration that they had a permanent and heritable right in the tank, but it was wholly unnecessary in my judgment for the appellants to have claimed or sought to prove in the present case that they were entitled to a permanent and heritable right. It was sufficient for them to prove that they had held the tank for many years as tenants and that they had been forcibly dispossessed, in 1318 Fasli.

This, in my judgment is not a case of a plaintiff claiming one relief and being given relief of a wholly different kind, but it is a case of a plaintiff claiming two reliefs one of which he is clearly entitled to and the other he has failed to prove himself entitled to. The Subordinate Judge distinctly finds that the patta of 1266 Fasli is proved. The truth is that the appellants' claim to a declaration that they are entitled to a permanent and heritable right rests on the construction which they sought to place upon the documents which they produced. The Subordinate Judge, while rejecting the award of arbitrators, pointed out that even if it was genuine it did not confer on any one a permanent and heritable right. Every allegation made by the appellants in this suit was proved to the satisfaction of the Subordinate Judge, except their allegation that the documents which they produced showed that they were entitled to

a permanent and heritable right. In my opinion the judgment of the Subordinate Judge was correct and I would allow this appeal, set aside the order of the learned Judge of this Court and dismiss the appeal to this Court with costs of both hearings.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 259

CHAMIER, C. J. AND SHARFUDDIN, J.

Lalit Kishore Mitra — Plaintiff—Appellant.

v.

Girdhari Singh and others—Defendants—Respondents.

First Appeal No. 470 of 1913, Decided on 17th July 1916, from decision of Sub-Judge, Mambhum, D/- 14th July 1915.

(a) **Partition—Suit for — Person holding limited interest entitled to partition—Lessee for years of under ground mines and minerals can claim partition.**

As under English law so in India a person holding a limited interest as a lessee for years may maintain a claim for partition. The right is not restricted alone to persons having a permanent title. [P 260 C 2; P 261 C 1]

A lessee, therefore, for 999 years of the underground mines and minerals can claim a partition against his lessor's co-sharers, especially when persons entitled to the reversion do not object to it. [P 261 C 1]

(b) **Partition Act (4 of 1893), S. 2—Impossibility no ground for refusing partition—Court entitled to order for sale.**

A partition should not be refused on the ground of its impossibility. If difficulties are actually met with in execution, the Court may order a sale under S. 2, Partition Act 20 Cal. 379, Dist; 24 Cal 575 (F B); *Heaton v. Deazden*, (1852) 16 Beav 147; *Baring v. Nash* 1 V & B 551, and 37 Cal 918, (P C), Ref. [P 261 C 1]

Pugh, Jayaswal Naresh Chandra Sinha and Sishir Kumar Mitra—for Appellant.

P. R. Das and Sailendra Nath Palit—for Respondents.

Chamier, C. J.—This was a suit for partition of underground mines and minerals in a village of which an eight-annas share belongs to defendant 1 and the remaining eight-annas share is the property of defendants 4 and 5. The only dealings with the property which need be noticed are (a) a mukarari of an eight-annas share granted on 26th September 1878, by the predecessor-in-title of defendant 1 to one Raghunath; (b) a lease of four muris of land and other rights granted by the predecessor-in-title of defendants 4 and 5 on 23rd September 1879, to Keshu, the son of Raghunath;

and (c) a lease for 999 years of the underground mines and minerals in half the village granted on 21st January 1908, to the plaintiffs by defendants 4 and 5.

The right of Raghunath and Keshu under leases (a) and (b) have, by reason of various assignments, vested in defendant 2, the Bengal Coal Co. Ltd. In view of certain well-known decisions of their Lordships of the Privy Council, it is probable that lease (a) did not affect the lessor's right to the underground mines and minerals in his share of the village, but the question need not be decided in this case. It is clear, and indeed it is conceded by counsel for the Bengal Coal Co. that lease (b) did not confer on the lessee any right to underground mines and minerals. The plaintiff is, therefore, entitled to the rights which lease (c) purports to confer upon him. The question for decision is, whether that lease entitles him to maintain a suit for partition. Defendants 4 and 5 support his claim to partition. Defendant 1 also is willing to have the underground mines and minerals partitioned. His case is that defendants 2 and 3 have no rights whatever to the minerals in his share of the village. The Subordinate Judge dismissed the suit, on the ground that the plaintiff as a lessee for a term only was not joint owner of the minerals with any other person, but was only entitled on certain conditions to carry on mining operations in half the village, that his rights under the lease of January 1908 did not entitle him to claim partition of the minerals, and that a partition was impossible. Counsel for the Bengal Coal Co. relied upon the decision in *Mukunda Lal Pal Chowdhry v. Lehuraux* (1), but the authority of that case is much shaken by the decision of the Full Bench in *Hemadri Nath Khan v. Ramani Kanta Roy* (2), in which Banerjee, J., delivering the judgment of the Court said at p. 581:

"In support of the first ground it is urged that the plaintiffs' predecessor-in-title having granted a putni of an undivided share of six annas in the entire zamindari, to allow the plaintiff to enforce partition and limit the putni to a specific portion of the zamindari proportionate to the 6 annas share would be to allow him to alter the terms of the putni lease against the will of the lessees. A contention somewhat similar to this was raised in *Heaton v. Dearden* (3) on behalf

of the defendant, whose predecessor-in-title had agreed to grant a lease of an undivided moiety of certain mines, in a suit for specific performance of the agreement to lease and for partition, and the contention was disallowed. And there is no reason why a different principle should be followed in this case."

and (at p. 583):

"I am unable to assent to the view that as a general proposition of law there can be no partition as between parties, the interest of one of whom is subordinate to that of the others. I think the Court must in each case determine whether having regard to the nature of the interest owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition, and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree ought not to be a bar to partition. This view is in accordance not only with the English cases cited in the argument, namely, *Baring v. Nash* (4) and *Heaton v. Dearden* (3) which may be referred to so far as as they deal with general principles, but also with the rules of justice, equity and good conscience, which our Courts are directed to follow in cases not provided for by any definite rule of law (See Act 12 of 1887, S. 37").

Counsel for the Bengal Coal Co. relied also upon the decision of the Privy Council in *Lala Bhagwat Sahai v. Bipin Behary Mitter* (5). In the course of their judgment their Lordships said:

"In the judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition. Their Lordships agree with the opinion of the Full Bench, in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid in dictating any view upon any such subject."

This case clearly cannot be relied upon as an authority for the proposition that only a person having a permanent title can claim partition. In *Baring v. Nash* (4), the Vice-Chancellor overruled a demurrer to a bill for partition by a lessee for a term of 500 years of which 73 had expired, and held that it was clear law that a person having a limited interest of that kind might claim partition. In *Heaton v. Dearden* (3) one of two tenants-in-common of an estate had agreed to grant a lease for 21 years of the mines under it. The Master of the Rolls held that the lessee was entitled to a decree

1. (1893) 20 Cal 379.

2. (1897) 24 Cal 575 (F B).

3. (1852) 16 Beav 147=96 P R 69=51 E R 733.

4. 1 V & B 551=35 E R 214.

5. (1910) 37 Cal 918=7 I C 549=37 I A 198 (F C)

for specific performance and for partition of the estate. In view of the suggestion made by counsel that an owner of land having given a lease of the surface cannot grant a lease of the minerals, I quote the following passage from the judgment of the Master of the Rolls:

"It was argued that the minerals being unbroken, and there being no agreement to demise the surface of the ground, you could neither have the specific performance nor a partition of the property. But so far as the partition is concerned, the point is decided by the case of *Baring v. Nash* (4) because a limited interest in a portion of the estate would not differ in effect from a limited interest with respect to the whole of the estate. With respect to specific performance, I am also of opinion that it is decided by the ordinary principles that a man may, if he pleases, sell his interest in the surface of an estate reserving the minerals, or he may sell his interest in the minerals reserving the surface, that he may demise and contract to demise the minerals alone, in the same manner as he may enter into a contract to sell them without the surface, and that having demised the minerals he has also given the right to get at them."

According to the English authorities it is clear that a lessee for years may maintain a claim for partition. I see no reason for holding that a different rule prevails in India. Moreover, the objections that have been taken at times to allowing a suit for partition by a person holding a limited interest do not apply to the present case. The plaintiff holds a lease for no less than 999 years and defendants 4 and 5 who are entitled to the reversion, desire that the claim for partition should be allowed. There remains the question whether a partition of the underground mines and minerals is impossible. In his plaint the plaintiff claimed a sale as an alternative to partition and the Bengal Coal Co. at once denied that the underground rights could not be conveniently partitioned or that a division could not reasonably or conveniently be made (written statement, para. 7). Their counsel in this Court seemed inclined to dissent from this. At present I see no reason to anticipate any special difficulty in effecting a partition but in case any such difficulty is found hereafter, we may reserve to the Court below the right to order sale under S. 2, Partition Act, 1893. I would allow this appeal and pass a preliminary decree for partition of the underground mines and minerals of the village, provided that, if hereafter it is found impracticable to partition the same, a sale may be ordered. The Bengal Coal Company must pay the appellant's costs in

this Court. All other parties will pay their own costs in this Court. Costs in the Court below will be costs in the cause.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 261

CHAPMAN, J.

Ganga Singh—Appellant.

v.

Raghunandan Das and others—Respondents.

Appeal No. 520 of 1916, Decided on 3rd November 1916, from the Appellate Decree of Addl. Sub-Judge, Patna, D/- 5th February 1916.

(a) **Bengal Tenancy Act (1885), S. 153**—**Though a question relating to some interest in land is decided yet if there is no decision between conflicting claims second appeal does not lie.**

In a suit for rent of the value of less than Rs. 100, the tenant alleged that the rent had been paid to an intermediate tenure-holder who was not made a party to the suit, and the lower Appellate Court held that there was no such intermediate tenure:

Held: that although a question relating to some interest in land had been decided, there was no such decision as between parties having conflicting claims thereto a second appeal to the High Court was barred by S. 153, Ben. Ten. Act. [P 261 C 1]

(b) **Bengal Tenancy Act (1885), S. 153**—**Suit for arrears by person claiming to be assignee of entire interest and not only of arrears of rent is a rent suit and S. 153 applies to it.**

A suit for arrears of rent instituted by a person claiming to be the assignee of the entire interest of the landlord, and not only of the arrears of rent only, is a rent suit under the Bengal Tenancy Act, and S. 153, Ben. Ten. Act applies to it. [P 262 C 1]

Pugh and Hari Bhushan Mukherji—for Appellant.

Manuk, Kulwant Sahay and Banwari Lal—for Respondents.

Judgment.—This is an appeal in a rent suit. The tenant alleged that the rent was payable and that it had actually been paid by an intermediate tenure-holder named Kali Singh.

The Court of first appeal held that there was no such intermediate tenure in actual existence and overruled the objection. Kali Singh was not made a party to the suit. The amount claimed in suit does not exceed Rs. 100. No second appeal lies to this Court, unless it can be held that the decision in respect of this intermediate tenure was a decision on a question relating to some interest in land as between parties having conflicting claims thereto under S. 153, Ben. Ten.

Act. The decision no doubt was a decision in a question relating to some interest in land, but it was not a decision of that question as between parties having conflicting claims therein, for Kali Singh was not made a party to that suit. It was then contended that this was not a suit for rent under the Bengal Tenancy Act and that, therefore, S. 153, has no application and that a second appeal would lie under the provisions of the Code of Civil Procedure. It is said that the plaintiffs who obtained the decree were assignees and, therefore, they were not landholders and the provisions of the Bengal Tenancy Act do not apply.

It appears that the suit was instituted by a Hindu widow for rent due for certain kists in the year 1912. During the pendency of the suit she executed a surrender in favour of her daughter's sons; the daughter also executed a deed confirming the surrender. Thereafter the widow died and after her death the daughter's sons made an applications to be substituted in the suit. These daughter's sons were the plaintiffs who obtained the decree. It is clear that at the time that they were substituted as plaintiffs they claimed to be landlords and not merely the assignees of the right of Gulab Kuer to sue for the arrears of 1912. It is not in fact suggested that there was any particular assignment of the right to sue for the arrears. Their claim to the arrears is based upon an alleged transfer of the entire estate held by Gulab Kuer to the plaintiffs. The plaintiffs claimed transfer as landlords and that being so the suit was under the Bengal Tenancy Act. The second appeal is, therefore, dismissed. There is an application for revision, but I am not satisfied that any ground for revision has been made out. It has been argued that the Court went beyond its jurisdiction in deciding the question of the plaintiffs' right to sue upon actual possession. Whether the Court was wrong or right in confining its attention to actual possession it had jurisdiction to determine the case in that manner. So far as the question of the existence of the intermediate tenure was concerned, the Court came to a finding that the mokarari deed was a dead letter and has never been given effect to. It is not possible to say that in coming to that finding and in deciding the case accordingly the Court had committed any error of

jurisdiction. The application for revision is also dismissed.

V.S./R.K.

Order accordingly.

A. I. R. 1916 Patna 262

MULLICK AND ATKINSON, JJ.

Mubarak Hussain—Defendant—Appellant.

v.

Syed Shah Hamid Hussain—Plaintiff—Respondent.

Second Appeals Nos. 734 and 735 of 1916, Decided on 17th November 1916, against the decree of Second Sub. Judge, Patna, D/- 15th May 1916.

(a) Civil P. C. (1908), O. 41, R. 31—Appellate Court—Contents of judgment of—Finding of fact when conclusive in Second Appeal, stated.

The mere recording of certain findings of fact is not conclusive in second appeal, unless the High Court is satisfied that the lower Court has applied its mind to the evidence before it. A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain state of facts is not a sufficient judgment within the meaning of the law, and the High Court is bound to interfere if it feels that there may have been a miscarriage of justice by a lower Court's failure to weigh all the evidence before it: 36 Cal 927, Ref. [P 263 C 2]

(b) Civil P. C. (1908), O. 41, R. 23—Remand—New contention cannot be allowed.

A contention not fairly arising out of the pleadings and not litigated in either of the Courts below cannot be allowed to be litigated on remand. [P 264 C 2]

Pugh, K. P. Jayaswal, Kulwant Sahay, Baldeo Narayan Singh and Abanibhushan Mukerji—for Appellants.

P. R. Dass and Mustafa Khan—for Respondent.

Judgment.—Appeals Nos. 734 and 735 of 1916 arise out of Suits Nos. 214 and 215 respectively. The lands in dispute in the former were 6 cottahs in area and those in the latter 17 dhurs, and it would seem that the suits are really test cases. The plaintiffs asked for a declaration of title and recovery of possession. The defendants denied the plaintiff's title to the lands and also pleaded adverse possession. The Munsif before whom the suits came in the first instance found that the lands were surveyed in the course of the thakbust survey at or about the year 1841 and that those of Suit No. 214 fell within blocks Nos. 597, 599 and 600, and those of Suit No. 215 within block No. 598. The Munsif also found that the former lay within the ambit of an estate named Sandalpore Kalan with an estimated area

of 316 bighas odd, which was permanently settled with the predecessor of the plaintiffs in or about 1790; that in 1841 the area was found on measurement to be 476 bighas 12 cottahs and to lie within Mouzah Sandalpore Kalan khas and its two sub-villages or chaks Mouzah Muhamedpur and Mouzah Mosalpur; that on the preparation of the land registration registers in 1876 the estate was numbered 303 and that in one of the registers an entry appears showing the area to have been corrected on 1st November 1910 from 297 acres 3 roods and 10 poles to 993 acres 2 roods 10 poles, i. e., from 476 bighas odd to 1590 bighas odd.

With regard to Suit No. 215 the learned Munsif found that the lands were measured as part of Mouzah Sandalpore in or about the year 1841 and that although that mouzah was entered in the mahalwar register prepared about that time as part of the plaintiffs' estate Sandalpore Kalan, it was not in fact part of that estate and was never assessed with revenue by Government as part of that estate. The learned Munsif then proceeded to consider whether the defendants had made out any case of adverse possession, and, after reviewing the whole of the evidence in a very elaborate judgment, he found that adverse possession had been made out in both suits. Therefore while finding for the plaintiffs on the issue of title he dismissed Suit No. 214 on the issue of limitation. With regard to Suit No. 215, I have already stated that the learned Munsif found that the lands were not within the ambit of the plaintiff permanently settled estate. Therefore this suit was dismissed both for defect of title and possession. The cases were then taken up in appeal before the learned Subordinate Judge and that Court while agreeing with the Munsif's finding as to Suit No. 214 with regard to the plaintiffs' title came to the conclusion that the defendants had failed to make out a case of adverse possession. He accordingly decreed the plaintiffs' suit. He also disagreed with the Munsif's decree with regard to Suit No. 215. The learned Subordinate Judge held that the estate which was created in favour of the plaintiffs' predecessor at the time of the Decennial Settlement comprised not only blocks Nos. 597, 599 and 600 but also block No. 598. He accordingly held that the plaintiffs had established their title

with regard to these lands and coming to the same finding as in the other case on the point of adverse possession he held that the plaintiffs were entitled to a decree in respect of Suit No. 215 also. The defendants accordingly prefer these second appeals before us. It is clear at the outset that these cases have not been disposed of in a satisfactory manner by the lower appellate Court. The learned Subordinate Judge no doubt records certain findings of fact and it is urged that these findings are conclusive in second appeal. But before we can accept that argument we have to satisfy ourselves that the learned lower appellate Court has applied its mind to the evidence before it.

A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain state of facts is not a sufficient judgment within the meaning of the law, and we are bound to interfere if we feel that there may have been a miscarriage of justice by the Court's failure to weigh all the evidence before it. Speaking for myself I have had the greatest difficulty in understanding some passages in the learned Subordinate Judge's judgment and I cannot help entertaining the doubt that there was considerable confusion in his mind as to the nature and effect of the evidence before him, so that while the learned Munsif in the course of a very careful and well-reasoned judgment has recorded his findings with clearness and precision, the learned Subordinate Judge has laid himself open to the charges of perfunctoriness and obscurity. As one instance of what I mean, it is only necessary to point to the summary manner in which the learned Subordinate Judge has treated the Commissioner's report. The learned Munsif found as a fact that the Commissioner had identified the lands in suit with the lands covered by the defendants' documents which date from 1853. The learned Subordinate Judge, without giving any reason whatever, states that it is impossible to identify the lands. Now this question of identification has an important bearing on the defendants' title and possession and surely the defendants were entitled to a considered and reasoned judgment on this point from the learned Judge when he set aside the Trial Court's finding. In my opinion there has been a serious error in procedure and the cases must be remanded in order that there

may be a proper trial of the issues raised and that justice may be done. If authority were needed in support of the course we are following, I would only refer to the remarks of Jenkins, C. J., in the case of *Pratap Narain v. Maigh Lal Singh* (1), where the learned Judge in the course of a judgment in second appeal observed as follows:

"The matter in dispute is one of great importance to the parties and deserving of a far fuller discussion than the learned District Judge has bestowed upon it; and, we cannot accept the few lines in which he has disposed of this part of the case as a judgment in accordance with law."

In remanding the cases however it is necessary to advert to a point which has been raised by Mr. Pugh before us. He alleges that in both suits his clients have a lakheraj title. I understand by this that his case is that the defendants claim on the footing of a revenue-free estate created either before 1790 or after 1790. If the defendants can show that the lakheraj was created before 1790 then that will be a conclusive bar to the plaintiffs' suit; on the other hand if the defendants give prima facie evidence of a lakheraj grant subsequent to 1790, then the onus will be on the plaintiff to show that the land is not lakheraj but that it is *mal* land and that it was assessed with public revenue at the time of the Decennial or Permanent Settlement. The mere fact that the lands fall within the boundary of the plaintiff's estate will not be sufficient to give them a decree; the plaintiff must show something more than that but the defendants must first give prima facie evidence of a lakheraj title. It is not necessary for us to indicate how the plaintiff is to establish his case, but it is quite possible that he may be able to show by collection papers or otherwise that the prima facie case of the defendants, if any, to hold the lands as lakheraj or revenue free has been rebutted by proof of payment of rent. The result therefore is that the decrees of the lower appellate Court will be set aside and the cases remanded to the file of the District Judge in order that the appeals may be heard by him and judgment recorded according to law. Costs will abide the result. We direct the District Judge to dispose of these cases, if possible, before the end of this year. I desire to add that although an attempt has been made by Mr. Pugh to suggest

that even if his clients, defendants 2 and 3, may fail to establish their title as holders of revenue-free estates they might still be entitled to hold as rent-free tenure-holders under the plaintiff's estate, if it should turn out the lands fall within the ambit of the plaintiff's estate; this contention cannot be said to fairly arise out of the pleadings; it was not litigated in either of the Courts below and we cannot allow it to be litigated on remand.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 264

JWALA PRASAD, J.

Seonarain Tewari—Defendant—Appellant.

v.

Sakhi Chand Sahu and another—Plaintiff and Defendants—Respondents.

Misc. Appeal No. 339 of 1915, Decided on 6th December 1916, against order of Dist. Judge, Durbhanga, D/- 24th May 1915.

(a) Criminal P. C. (1898), S. 139—Recommendation of jury under S. 139 accepted by Magistrate cannot be specifically enforced in civil Court nor will suit lie for damages—Specific Relief Act (1877), S. 12.

The recommendation of a jury made under S. 139, Criminal P. C., directing the parties to a dispute to perform certain acts which has been adopted by the Magistrate, can only be enforced in manner provided for in Cl. 2 of the section, and cannot be specifically enforced in a civil Court on the basis of a contract between the parties, nor will a suit for compensation lie for breach of the order.

The report of the jury to the Magistrate does not constitute a contract between the parties in the absence of evidence of a separate agreement entered into between the parties themselves.

[P 266 C 2]

(b) Criminal P. C. (1898), S. 139—Order rescinding order absolute is not ultra vires.

An order of a Magistrate rescinding an order absolute previously made under S. 139 is not ultra vires and cannot be called in question in a civil Court.

The defendant applied to a Magistrate for removal of the embankment of a tank constructed by the plaintiff, on the ground that it obstructed the passage of the village water and endangered the houses in the village. The Magistrate made a conditional order directing the removal and it was referred to a jury under S. 138, Criminal P. C. The jury proposed that the water of the village should be allowed to flow out through the tank, that the banks of the tank on the north and south should be cut and that each party should construct sluices on each bank of the tank. They also recommended that each party should deposit Rs 400 with one of themselves to ensure carrying out of the direction, which was accepted by the parties through their representa-

tives. The Magistrate adopted this report and made the conditional order absolute. Subsequently, on inspection of the spot, the Magistrate thought the making of a culvert unnecessary and directed the refund of the money to the parties. Plaintiff, however made the culvert in the meantime in pursuance of the original order. He now sued defendant for specific performance of the contract to construct the sluice or for damages in the alternative :

Held : (1) that the report of the jury did not amount to a contract between the parties and could not be made the basis of an action in the civil Court for specific performance or damages ; [P 266 C 2]

(2) that the order of the Magistrate directing refund of the deposit was not ultra vires and could not be questioned in a civil Court; [P 266 C 2]

(3) that the order absolute under S. 139 (1), Criminal P. C., could only be enforced in the manner provided in Cl. (2), S. 140. [P 266 C 1]

Abani Bhusan Mukerji—for Appellant.

Nirsu Narain Sinha—for Respondents.

Judgment.—This appeal arises out of a suit for specific performance of a contract. The respondent was the plaintiff in this case. In 1912 he had excavated a tank in a village called Rampur Doodhpura. The appellant, who was defendant 1 party in this case, along with other residents of the village applied to the Magistrate of Samastipur for the removal of the embankment of the tank, on the ground that it obstructed the passage of the village water and hence there was great apprehension that the houses of the village would fall. A conditional order was passed by the Magistrate under S. 133, Criminal P. C., directing the plaintiff to cut the embankment in order to allow the village water to pass, and a notice was served upon the plaintiff. The plaintiff under S. 135 claimed a jury. The jury found that the water of the village should be allowed to flow out through the tank, that the banks of this tank on the north and the south should be cut, and that each party should construct pucca sluice on each bank of the tank. The jury submitted their report on 8th July 1912. The report says that the parties accepted the proposal and deposited Rs. 400 each with one of the panches Babu Basant Lal to ensure that they would make the respective culverts. Upon this report the Magistrate on 18th July 1912 made the order under S. 139 absolute.

On 17th August 1913 the Magistrate visited the spot and came to the conclusion that it was not necessary to make a culvert at all and that each party was

trying to make the other waste money. Subsequently on the application of the defendant 1st party the Magistrate ordered a refund of the money deposited. The plaintiff's case is that in pursuance of the order of the Magistrate and the undertaking by the defendant 1st party to make one of the culverts, he had collected bricks and made the culvert that he had undertaken to make. On these facts the plaintiff says that there was a contract between the parties to make the culverts in pursuance of which he had performed his part of the contract and that the defendant 1st party was bound to perform his, and to build the culvert. The defendant 1st party failed to make one.

The plaintiff has, therefore, brought this suit (1) for a declaration that there was a contract between the plaintiff and the defendant 1st party and that the last order of the Magistrate directing the refund of the money to the defendant was ultra vires and contrary to the terms of the contract; (2) for an order directing the defendant to have one sluice gate constructed, failing which the defendant 2nd party Basant Lal with whom the money was deposited may get the culvert built out of the money deposited by the 1st party and that a temporary injunction be issued; and (3) that on failure of the defendant 1st party to construct the culvert the same may be constructed by the Court at the cost of the plaintiff, which may be recovered from the defendant 1st party and paid to the plaintiff. The 1st Court dismissed the suit, on the ground that the last order of the Magistrate was not ultra vires and that there was no contract valid in law which could be specifically enforced. The lower appellate Court on appeal by the plaintiff held that there was a contract between the parties, but that it was not capable of being specifically enforced. The Court, however, held that the plaintiff has done some work towards his part of the contract and, therefore, he was entitled to compensation for loss incurred on this account by the defendant's failure to perform his part. The case was remanded to the first Court for the determination of the amount of compensation to which the plaintiff was entitled. The defendant 1st party has appealed to this Court. The sole question is whether there was any contract between the parties and whether the plaintiff is entitled

to any compensation. The Court below has held that there was a contract between the parties. It has based its finding on an extract from the report of the Jury quoted in the judgment. The extract is as follows:

"Thus all the proposals were already explained to the parties in presence of the mukhtiar of the one party and relatives of the other, and they both accepted the proposal quite willingly and the estimate of the cost. Thus Rs. 400 was deposited by each party with one of the panches, Babu Basant Lal, to ensure that none of them may evade making of the culvert later on when the passage for water is cut, for then the panches will have every right to get the culverts made out of the sum deposited. With this understanding everything was settled and the parties were allowed to collect materials for the same."

The sole question is whether the above report of the jury constitutes any valid contract between the plaintiff and the defendants, there being no other evidence of any agreement entered into between the parties themselves. The jurors were appointed to find out and report if the conditional order of the Magistrate to cut the embankment of the tank was reasonable or not, in order that the Magistrate may make the conditional order absolute or not. The jurors found against the plaintiff that the embankment of the tank was an obstruction to the village water and should be cut. They, however, thought it desirable that a culvert should be made on each of two sides of the tank. The jury proposed to the parties that each one of them should make one culvert on either side of the tank. The proposal of the jury was accepted by the parties through their representatives. There is nothing to show that there was any contract between the parties themselves. The understanding to build a culvert was given to the panches. The Magistrate accepted the report of the jury, made the order absolute under S. 140, Cl. 1. Under this section the Magistrate has power to direct any party to perform such acts as he considers reasonable and to enforce the same. Under Cl. 2 of this section if the parties fail to perform the act, the Magistrate may cause it to be performed and recover the costs from the parties in the manner prescribed by the section. It was under this clause that each party was required to deposit Rs. 400 with the panch so that on their failure to build the culverts the Magistrate may get them constructed by the panch. The

order of the Magistrate was made under this section.

The plaintiff has a remedy provided by this section and could move the Magistrate only to get the culvert built. The plaintiff has no right to enforce it against the defendant by a suit for specific performance, for there was no undertaking given by the defendant to the plaintiff, but it was undertaking given by him to the Magistrate. I, therefore, think that there was no contract between the parties and the suit to enforce specific performance cannot lie. The Magistrate thought finally on local inspection that there was no necessity to make the culverts at all, and that each party was trying to make the other waste money. The Magistrate directed the refund of money. The plaintiff has built his culvert in accordance with the undertaking given by him to the Magistrate. He has spent his money on account of the order of the Magistrate and not in pursuance of any agreement made with him by the defendant. He has no right to recover any money spent by him on account of the Magistrate's order as against the defendant and he cannot recover the same from the defendant as damages or compensation. It may be mentioned here that under S. 133, Cl. 2, the order of the Magistrate under this section issuing additional order cannot be called in question in a civil Court. Under S. 140, Cl. 3, no suit shall lie in respect of anything done under good faith under this section. Hence no suit can lie against the order directing the refund of the money by the Magistrate who held that the building of the culvert was quite unnecessary. The final order of the Magistrate directing the refund and holding that the culvert need not be built is not ultra vires and cannot be called in question in the suit. The plaintiff has, therefore, no cause of action against the defendant and the suit should be dismissed. The appeal is allowed with costs. The plaintiff is entitled to costs incurred by him in the lower Courts for defending the suit.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 267
Full Bench

CHAMIER, C. J., SHARFUDDIN AND
 KINGSFORD, JJ.

Ram Asray Singh and others—Plain-
 tiffs—Appellants.

v.

Sheonandan Singh and others—De-
 fendants—Respondents.

Second Appeal No. 549 of 1916, decided
 on 28th July 1916, from the decision of
 Addl. Judge, Shahabad, dated 4th Janu-
 ary 1914.

(a) Limitation Act (9 of 1908), S. 12—Ap-
 peal—Time to run from signing of decree.

In appeals the period of limitation should be
 calculated from the date on which the decree was
 actually signed: 13 Cal. 104 (F. B.), *Foll.*

[P 267 C 2]

(b) Limitation Act (9 of 1908), S. 12—Time re-
 quisite for obtaining copies—Folios not depo-
 sited owing to dilatoriness—Exclusion of time.

An applicant for a copy should deposit the re-
 quired number of folios not later than the first
 day on which the office of the Court is open after
 that on which the number of folios was notified
 to him, and in calculating the time required for
 obtaining a copy the applicant is not entitled to
 deduct the days during which the preparation of
 the copy was delayed by his own neglect to
 furnish the folios. In other words, the length of
 time requisite for obtaining a copy within the
 meaning of S. 12, Lim. Act, ought not to vary
 with the dilatoriness of the applicant in supply-
 ing the required number of folios. [P 263 C 1]

(c) Civil P. C. (5 of 1908), O. 32, R. 3—
 Guardian ad litem not formally appointed,
 but allowed to represent minor—Omission
 not fatal to suit.

Where in a suit an application for appoint-
 ment of a guardian ad litem is made and the
 guardian nominated in the application is allowed
 to represent the minor at the trial, the mere
 omission of a formal order appointing the guar-
 dian is not fatal to the suit. [P 268 C 2]

(d) Civil P. C. (5 of 1908), O. 1, Rr. 1,
 and 9—Non-joinder of necessary parties—
 Suit liable to be dismissed.

Where in a suit for profits for zeraft land held
 by defendants in excess of their shares all the
 co-sharers are not made parties, the suit ought
 to be dismissed for non-joinder of the necessary
 parties in whose absence the excess could not be
 determined. [P 263 C 2]

S. Sinha and Parmeshwar Dayal,—for
 Appellants.

Shahabuddin Khan—for Respondents.

Chamier, C. J.—The first question
 for decision is whether this appeal was
 filed within time. The judgment of the
 lower appellate Court was pronounced on
 4th January 1916. The decree was signed
 on 8th January. An application for copies
 of the judgment and decree was presented
 on 17th February and on the same day
 notice was given to the applicant of the
 number of folios required for the copies.

The folios were filed on 22nd February
 and a note was then made on the back of
 the counterfoil of the application that
 the copies would be ready on 24th Febru-
 ary. The applicant received the copies
 on the last mentioned date and filed his
 appeal in this Court on 14th April. The
 appeal was filed within time if limita-
 tion is calculated from 8th January the
 day on which the decree was signed, and
 the appellant is allowed to deduct all the
 time that elapsed between the date of the
 filing of the application for the copies
 and the delivery of the same. It was
 held by a Bench of five Judges of the Cal-
 cutta High Court, as long ago as May
 1886, that in cases of this kind the period
 of limitation should be calculated from
 the date on which the decree was actu-
 ally signed: see *Bani Madhub Mitter v.*
Matungini Dassi (1). That decision has
 not been followed by all the other High
 Courts, but the practice is so well esta-
 blished in the territories over which this
 Court has jurisdiction that we think we
 ought to follow it. Limitation must,
 therefore be calculated in the present case
 from 8th January.

The question whether an appellant is
 entitled under S. 12, Lim. Act, to deduct
 all the time that elapsed between the
 date of his application for a copy and
 the date on which it was delivered to him,
 even if delivery of the copy was delayed,
 as in this case, by reason of his own
 neglect to file the folios as soon as the re-
 quired number was notified to him, has
 not so far as we are aware been the sub-
 ject of any reported decision of the Cal-
 cutta High Court. But we are informed
 that for some time past it has been the
 practice on the appellate side of that
 Court to allow the appellant to deduct all
 the time that elapsed between the pre-
 sentation of his application for a copy
 and the delivery of the copy, although the
 preparation of the copy was delayed by
 his own neglect to file the folios. We are
 not prepared to follow this practice, which
 seems to us to be contrary to law. It
 appears that in some cases litigants have
 taken advantage of it to give themselves
 a longer period of limitation than the law
 intended to give them. We understand
 that it has been held generally in the
 Subordinate Courts that an applicant for
 a copy should deposit the required number
 of folios not later than the first day on

1. (1886) 13 Cal 104 (F B).

which the office of the Court is open after that on which the number of folios was notified to him and that in calculating the time required for obtaining a copy the applicant is not entitled to deduct the days during which the preparation of the copy was delayed by his own neglect to furnish the folios. This appears to us to be a reasonable rule and we propose to enforce it for the future in all cases to which S. 12, Lim. Act, applies, both with reference to appeals and applications filed in this Court and with reference to appeals and applications filed in Subordinate Courts. It appears to us that the length of time requisite for obtaining a copy within the meaning of S. 12, Lim. Act, ought not to vary with the dilatoriness of the applicant in supplying the required number of folios. The present appeal was in our view of the law filed beyond time, but there can be little doubt that the appellants relied upon the practice which prevailed in the Calcutta High Court and under the circumstances we hold that they have within the meaning of the explanation to S. 5, Lim. Act, established sufficient cause for not filing their appeal within time.

The appeal arises out of a suit brought by the appellants for a declaration that respondents 1 to 4 were in possession of a certain quantity of zerait land in excess of their proper shares. The appellants claimed to be entitled to a share in the profits of the excess lands. The Subordinate Judge dismissed the suit, because the appellants did not procure the formal appointment of a guardian ad litem for two of the respondents and also because the appellants failed to implead as defendants two persons who held shares in the village. On appeal the Additional District Judge agreed with the Subordinate Judge that the suit must fail because a guardian ad litem had not been appointed for two of the minor respondents, and expressed the opinion that persons in the position of the present appellants were not entitled to make a claim of this kind against cosharers who were found to be in possession of zerait lands in excess of their shares. We should have found it difficult to sustain the dismissal of this suit on the ground that a guardian ad litem was not appointed for the two minor respondents, for it appears that the appellants put in a formal application for the appointment of a guardian ad litem of

these respondents. They also mentioned the proposed guardian in the plaint and the proposed guardian, who was the elder brother of the two minors, was allowed to represent the respondents at the trial. In these circumstances it would be difficult to hold that the suit should be dismissed merely because there was no formal order appointing a guardian ad litem. It seems to us that the learned Additional Judge has overlooked the para. 18 of the written statement, which appears to admit the existence of a practice among cosharers in this village whereby any cosharer, who cultivates land in excess of his share, takes one-half of the produce as if he were the raiyat of the land and distributes the remaining half to cosharers in the village. But it seems to us that the appellants' suit was rightly dismissed in consequence of their failure to implead two of the cosharers in the village. The principal question of fact in dispute between the parties is the extent of the zerait land held by the respondents or some of them in excess of their shares. This cannot be finally determined in the absence of some of the cosharers in the village, nor can the profits or any portion of the profits of the excess land be distributed amongst the parties behind the backs of some of the cosharers in the village. For these reasons we are of opinion that the suit was rightly dismissed and we dismiss this appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 268

SHARFUDDIN AND ROE, JJ.

Abu Mahomed Mian—Defendant—Appellant.

v.

Mukut Pertap Narain and others—Plaintiffs—Respondents.

Second Appeal No. 695 of 1914, Decided on 14th April 1916,

Civil P. C. (5 of 1908), S. 148 and O. 20, R. 14—Time for deposit of pre-emption price can be extended—Pre-emption—Decree.

Under S. 148, Civil P. C., Courts have a discretion to extend the time fixed in a pre-emption decree for deposit of the pre-emption money: 14 All. 529 and 18 All. 223, Dist. [P 263 C 1]

Krishen Sahai and Lal Mohan Ganguli—for Appellant.

Rajendra Prasad—for Respondents.

Roe, J.—This is an appeal against a decree for pre-emption. The learned Sub-

ordinate Judge has arrived at final findings of fact that the necessary legal ceremonies were performed. The decree is open to criticism only on the ground that the learned Subordinate Judge directed that the money fixed as the price for the pre-emption should be deposited within one month of the date of the delivery of his judgment, that it was not so deposited, and that, therefore, under O. 20, R. 14, Civil P. C., the suit stood in fact dismissed from the date of the failure to make the necessary deposit. The actual facts of the case are, that on the last day fixed for the deposit of the money, the decree-holder made an application to the Court for an extension of time to make the deposit; that the application was granted, a month's time was given, and the deposit was made within that month. It is contended that the order granting this extension was made without jurisdiction and should be set aside under S. 115, the consequence of the setting aside of that order being that the right of pre-emption has not been exercised and the suit fails. I am of opinion that S. 143 covers a case of this nature.

The only authorities which have been put before us in respect of suits for pre-emption are to be found in *Jai Kishen v. Bhola Nath* (1) and *Jaggar Nath Pande v. Jokhu Tewari* (2). In neither of these cases were any applications made for extension of time, in neither of them was any extension granted. It is clear that these two cases are distinguishable from the case before us. Under S. 148 discretion is vested in the Subordinate Judge to extend the time within which the act prescribed by his decree should be done. It may be that the discretion exercised in this particular case was unwisely exercised; it may be that the Subordinate Judge should have issued notice to the other side before granting the application; the fact remains that, under S. 148, the Court has discretion vested in it to pass the order now under criticism. It is not possible for us to interfere under S. 115. The appeal is dismissed with costs. The Rule issued is discharged. We make no order as to the costs of the Rule.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

1. (1892) 14 All 529.

2. (1896) 18 All 223.

A. I. R. 1916 Patna 269

ROE AND JWALA PRASAD, JJ.

Sheobux Singh and others—Appellants.
v.

Dayal Singh and others—Respondents.

First Appeal No. 473 of 1913, Decided on 3rd May 1916, from decision of Special Sub-Judge, Palamow, D/- 12th September 1913.

(a) Civil P. C. (5 of 1908), S. 11—Finding of existence of family custom—All branches impleaded—Question decided after contest—Some branches not contesting does not prevent its operating against all.

Where it is necessary to establish or deny a custom in a family, and where pains have been taken to bring upon the record every branch of the family, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, the matter cannot be again raised by the descendants of those branches, even though certain branches did not take an active part in the contest, but contented themselves with admitting that the custom existed: 12 Cal 580 and 13 Cal 352, Ref. [P 270 C 2]

(b) Limitation Act (9 of 1908), S. 3—Question of limitation can be raised at any stage.

A point of limitation can be taken at any time. [P 271 C 2]

R. L. Dutt—for Appellants.

P. K. Sen and Rajendra Prasad—for Respondents.

Judgment.—The parties to this suit are an aboriginal family called Cheroos, resident in the District of Palamow. The plaintiffs claim that the property in dispute, Lot Chondo, was granted many years ago to the head of the family, Dhut Roy, otherwise called Dhurup Singh, Dhut Roy had three sons, Bhukan, Baiju and Pahalwan. Bhukan predeceased his father leaving no issue. Baiju also predeceased his father. The plaintiffs, 29 in number, are either the descendants or transferees from the descendants of the sons of Baiju Singh. The defendants are descendants of Pahalwan Singh. The plaintiffs' suit is for a partition of their share of the property granted to Dhut Roy. The defendants resist the suit on the ground that the grant of Lot Chondo was made, not to Dhut Roy, but to Pahalwan Singh, and has descended by a rule of primogeniture to defendant 4, Nar-singh Dayal Singh. The learned Subordinate Judge framed three issues in the case. 1. Are the plaintiffs in possession? 2. What are their respective shares? 3. To what reliefs are the plaintiffs entitled? He decided these three issues in seven lines, upon the supposition that

the whole case was res judicata by reason of the decision of Coxe, and Imam, J.J., in cases reported as *Kali Churun Singh v. Sheo Baksh Singh* (1). These cases were Appeals from Original Decrees Nos. 379 and 446 of 1908.

We feel constrained to say, that the view taken by the learned Subordinate Judge was utterly unwarranted. No question of possession in 1913 could have been decided by their Lordships in a suit filed in 1908; and if the learned Subordinate Judge had taken the trouble to read the judgment in Appeal No. 446, he would have seen at once that their Lordships deliberately left unadjudicated the rights of the present plaintiffs. There must be a remand for a decision upon the merits. The question before us now is, on what points shall we direct the Subordinate Judge to allow evidence to be given remand. It is strenuously contended by Mr. Dutt on behalf of the appellants that the defendants should be allowed to go into the whole history of Lot Chando, whether it was granted to Dhut Roy or Pahalwan, and into the question of primogeniture raised in the written statement. We refuse to allow this for two reasons. The first and, in our view, conclusive reason is, that no issue has been framed between the parties upon the questions of primogeniture and the identity of the original grantee. The first issue is, 'are the plaintiffs in possession?' The second issue is, 'what are their respective shares?' It was not suggested that the plaintiffs had no shares. Though the questions of primogeniture and the grant to Pahalwan were raised in the written statement, when issues were framed, the defendants resiled from the contest upon these two points.

Our second reason for declining to allow any evidence to be produced upon these two questions is, that the whole matter was thoroughly threshed out in suits Nos. 100 and 101 of 1898, which came before the High Court and were decided in Appeals from Original Decrees Nos. 445 and 446 of 1900. Three issues were considered by their Lordships:

(1) Is the plaintiff in possession of the property in suit? (2) Does the rule of primogeniture prevail in the family of the parties? (3) Was the property in suit granted in jagir to Pahalwan Singh as alleged by the defendants. The decision

upon these issues was: (1) The plaintiffs are in possession. (2) There is no rule of primogeniture. (3) The grant was made to Pahalwan Singh as representative of the whole family of Dhut Roy.

My learned brother and myself have been at very great pains to compare carefully the parties to that litigation with the parties in the present suit. We have satisfied ourselves that every possible branch of Dhut Roy's family was represented. It is true that a large number of them were arraigned only as pro forma defendants, and that they entered into no contest in the suit, contenting themselves with admitting the plaintiffs' claim to a share in the jagir. It is urged by Mr. Dutt that it cannot be said that they were, within the meaning of S. 11, parties between whom the present questions in dispute were directly and substantially in issue. A number of rulings have been quoted; in particular, *Brojo Behari Mitter v. Kedar Nath Mozumdar* (2) and *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry* (3). We are of opinion that these rulings have no application to the present matter. Where it is necessary to establish or deny a custom in the family, and where pains have been taken to bring upon the record every branch of the family, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, it is, in our view, absurd to contend that the matter can be again raised by descendants of those branches; even though certain branches did not take an active part in the contest, but contented themselves with admitting that the custom existed. We hold that all branches of the family of Dhut Roy were bound by the decision in Appeals from Original Decrees Nos. 445 and 446 of 1900, whereby the custom of primogeniture has been specifically disproved. The same considerations apply to the decision upon the issue, what was the history of this property? The matter was thoroughly investigated in the presence of the whole family. The decision upon that investigation must be held to be res judicata.

It is contended that Narsingh Dayal Singh, the principal defendant, was not on the record in the previous suits, and

1. (1912) 15 I C 657.

2. (1886) 12 Cal 580.

3. (1886) 13 Cal 352.

that, therefore, against him the decision is not binding. He is the son of Ghinu Singh, who was the principal defendant in the former litigation. In the appeal before Coxe and Imam, JJ., the argument put forward was, that as a Mitakshara son he became from birth a sharer in his father's estate. This argument found no favour with their Lordships, for the reason that the defence to the whole suit was not that the family was a Mitakshara family but one governed by the rule of primogeniture. It is, therefore, before us argued that the particular rule of primogeniture pleaded is not that of direct seniority among the sons of the family, but the rule that the eldest surviving member of the family succeeds to the property, that, therefore, each member as he becomes the eldest surviving member acquires a new right to re-open the whole question and to require each one of the members who have been parties to the previous litigation to again attack him and disprove the custom. In this argument there is no substance. If any such rule as is here suggested exists, the sons of Ghinu had no locus standi in the previous litigation, and were, therefore, not necessary parties to that suit.

In the present suit Narsingh Dayal derives his interest directly from Ghinu and is bound by the decision to which Ghinu was a party. There would have been some force in an argument that defendants 5 to 9, having pleaded in the alternative that the property was granted to Pahalwan and that they had shares therein to the exclusion of the plaintiffs, were not bound by the decisions against Ghinu their father. This point was specifically taken in the grounds of appeal, 6 and 7. The decision thereon depends upon the position of Ghinu in the previous litigation. For this purpose it is necessary to refer to the plaint in Suit No. 101 of 1898. The principal defendants were nine in number, and represented the eight branches of the family of Pahalwan. Those defendants who were not minors in 1913 must have been alive in 1898. They are Gambhir Singh, the son of Sheo Bahadur, Narsingh Dayal and five others, the sons of Ghinu, and Mahabal, the son of Harbaksh. Each of the brothers Ghinu, Sheobaksh and Harbaksh had sons living. Those sons were not brought on to the record. It

was not suggested that the suit was bad for misjoinder of parties. The inference is irresistible that Ghinu, Sheobaksh and Harbaksh were sued as representing the families of which each was the head. The decision in the suit must be held to bind these families.

We are satisfied that the questions of primogeniture and of the grant to Pahalwan must not be again investigated. The learned Subordinate Judge will take it as proved that the family is an ordinary Mitakshara family, that the property was the property of Dhut Roy, and that the various shares to which the various members are entitled, are governed by the Mitakshara law. We remand the case for a decision upon the two issues framed. Firstly, "are the applicants to the partition in possession of the property?" It is said that there is overwhelming evidence that this is so, nevertheless the learned Subordinate Judge is required to come to a decision upon the point, for the reason that a Court-fee of only Rs. 10 has been paid. If the plaintiffs are not in possession the suit is not maintainable upon that Court-fee. Secondly, careful inquiry must be made into the shares of the plaintiffs of this litigation.

We also invite the attention of the learned Subordinate Judge to the fact that the question of limitation is one that may be taken at any time. It is desirable, if he finds that the plaintiffs are not in possession, and allows them to continue their suit on payment of the requisite Court-fees, that he should come to a finding of fact as to whether the defendants have been in adverse possession for a period of 12 years prior to the suit. The appeal is decreed. Costs will follow the result of this litigation; the suit is remanded for a decision upon the issues framed. Our attention has been drawn to the fact that large sums are being expended upon this partition, which was commenced upon the preliminary decree which we have now set aside. We understand that this partition is being made collaterally with the partition ordered by Coxe and Imam, JJ., of the share of Kali Charan. We have no doubt that steps will be taken to preserve the papers of that partition and the measurements and calculations made to date in the present partition, for use

when required for a partition as the final result of this litigation.

V.S./R.K.

Appeal decreed.

A. I. R. 1916 Patna 272

ATKINSON AND KINGSFORD, JJ.

Mohini Mohan Banerji and another—
Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 216 of 1916, Decided on 4th August 1916, against the order of Deputy Commissioner, Bhagalpur, D/- 11th July 1916.

Penal Code (45 of 1860), Ss. 183 and 186—Resistance to execution of warrant—Warrant must be lawful and person executing must have authority—Warrant without date of return is illegal—Nazir-not authorised to execute.

In order to support a conviction for resistance to a public servant in discharge of his duty, the warrant must be a lawful one and the person who executes the warrant must be clothed with lawful authority under the warrant to execute it.

[P 272 C 2]

A warrant of execution which does not bear a date on or before which it should be executed is not a good warrant: 37 Cal 122, *Foll.*

[P 272 C 2]

The Nazir of a Court has no lawful authority to execute a warrant directed to the bailiff of the Court: 40 Cal 849, *Ref.* [P 272 C 2]

It is no offence to resist the execution of a bad warrant, or to obstruct the execution of a warrant by a person to whom it is not directed: 40 Cal 849, *Ref.*; 37 Cal 122, *Adopted.*

[P 273 C 1]

*Pugh, Sarat Kumar Banerji and Abani Bhusan Mukherji—*for Accused.

Atkinson, J.—This is an application by the accused to have the order of conviction in this case set aside. He was charged under Ss. 183, 186 and 353, I. P. C. These sections contemplate resistance to Police officers or other people in charge of the administration or execution of warrants and endowed with lawful authority. The applicant contends that what took place, giving rise to the prosecution in his case, was not the infringement by him of any lawful right of the person who came to the accused's lane to execute the warrant which was entrusted to him for execution. In a civil action brought against the accused, an interlocutory order for attachment was made, and the Court issued a warrant, directed to the bailiff of the Court directing him to seize all the soapstones and finished soapstone-ware that were in the defendants' "quarry and workshop". It is con-

tended that that did not authorise the officer executing the warrant to enter the accused's house and seize whatever materials in the shape of soapstone might be there. The officer sought to enter and was resisted by the accused, who threatened to shoot him if he persisted. The officer charged with execution of the warrant was the Nazir of the Court and he complained that he was resisted by the accused in the discharge of his duty, and hence the charge that was subsequently framed against the accused under the sections of the Penal Code that I have mentioned. It is contended now on behalf of the accused that he committed no offence at all, because, first of all, the warrant was executed by a person to whom it was not addressed, secondly, the warrant was uncertain, inasmuch as it prescribed no time within which it should be executed and thirdly, it did not authorise the seizure of things that were in the dwelling-house of the accused, and that thus there was no resistance by the accused to a person lawfully authorised to execute the warrant.

Mr. Pugh has satisfied us on the authority referred to in *Sabed Ati v. Emperor* (1) that the bailiff of the Court is a distinct and known person who corresponds to the peon in this country; but certainly a bailiff is not a Nazir. Therefore, inasmuch as this warrant was executed by the Nazir, who is a person to whom it was not addressed, it did not clothe the person who received it with lawful authority for its execution. Accordingly on this ground alone this conviction cannot stand; because, in order to support the conviction, it must be based upon a lawful warrant, and the person who executes the warrant must be clothed with lawful authority under the warrant to execute it. The man who executed it, in fact the Nazir, had no authority, it was not directed to him, and, it was not within the purview of his duty to take upon himself the voluntary execution of it, and if he did so, then the execution so made by him was not in pursuance of the warrant, and, therefore, not lawful. Under O. 38, R. 7. the method in which an attachment of property is to be carried out is prescribed to be the same as that in the case of a decree. O. 21, R. 24, prescribes what are the essentials necessary in the execu-

tion of a decree, and sub-Cl. 3, R. 24, provides that:

"In every such process a day shall be specified on or before which it shall be executed."

This warrant contains no specified day upon which or before which it should be executed. It is absolutely blank in point of time, uncertain, and would operate as a continuing authority indefinitely. In our view the case of *Sheikh Naseer v. Emperor* (2) clearly applies to this case, and we adopt the judgment of the learned Judges there, who laid down:

"That it was material that the warrant should bear a date on or before which it might be executed."

Therefore this warrant failed in an essential particular, and was at the time of the resistance, on the face of it, not a good warrant. For that reason also we think this warrant is bad and the conviction which has been obtained upon it, and the charges founded upon it, cannot be sustained. We shall offer no opinion upon the question raised as to the scope of the properties to be seized. Whether the schedule applies to the properties within the house it is not necessary to discuss. We shall, therefore, set aside this conviction and order that the accused shall be discharged from his bail.

Kingsford, J.—I concur.

V.S./R.K. *Revision accepted.*

2. (1910) 37 Cal 122=5 I C 409.

A. I. R. 1916 Patna 273

CHAPMAN AND ATKINSON, JJ.

Mt. Umatol Soghra—Appellant.

v.

Mt. Zohra and others—Respondents.

Appeal from Appellate Decree No. 3632 of 1913, Decided on 26th April 1916.

Contract Act (9 of 1872), S. 70—Suit by several plaintiffs for common benefit—Right of contribution for costs when arises stated.

Where several persons join together in instituting a suit to secure a common benefit and only one of them bears the expenses of the litigation, he is entitled to be reimbursed by his co-plaintiffs in contribution (1) by virtue of an express agreement between them settling the proportion in which the expenses had to be met by each, (2) by reason of the plaintiff having paid counsel after he was engaged by all the plaintiffs jointly, or (3) under the provisions of S. 70, Contract Act.

[P 274 C 1]

Pugh, Muhammad Ishaq and Muhammad Mustafa Khan—for Appellant.

Baldeo Narain Singh—for Respdts.

Chapman, J.—This appeal arises out of a suit for contribution. The plaint recites that the plaintiff is the proprietor of

eleven annas odd of a certain Mouza Kusunda, that defendant 1 is the proprietor of four annas odd of that mouza and that defendants 2 to 4 are the proprietors of the remaining 13 dams odd. There arose a dispute with the proprietors of a neighbouring village over an embankment which affected the irrigation of the lands of Mouza Kusunda. The result was that the plaintiff and the defendants joined in instituting a suit against the neighbouring proprietors. In consultation with the cosharers and servants of some cosharers the services of a pleader and Mukhtar were engaged. The plaintiff, being a cosharer of a major portion of the property, was entrusted with the duty of looking after and conducting the prosecution of the aforesaid suit and it was agreed between the plaintiff and the defendants that they would refund expenses incurred by the plaintiff in proportion to their shares in the mouza. The conduct of the suit was thereafter in the hands of the plaintiff, who spent a sum of Rupees 6,695 in the prosecution of it. The irrigation suit was dismissed. Defendants 2 to 4 repaid the plaintiff a proportionate amount of the expenditure incurred by her, but defendant 1 declined to make any payment. The present suit was for a sum of Rs. 1,749 odd, being the proportionate amount due from defendant 1 under the agreement by which defendant 1 promised to pay a proportionate share of the expenses incurred by the plaintiff in the conduct of the irrigation suit. The present suit was contested by defendant 1 alone. Her case was that it was the plaintiff alone who desired to institute the irrigation suit, that she was compelled by the plaintiff to join in the irrigation suit as a co-plaintiff, that undue pressure was exercised and that further it was expressly agreed that the expenses of conducting the suit would be borne by the plaintiff.

When the present suit came to trial the question of jurisdiction arose. The suit was instituted in the Gaya District. The defendant pleaded to the jurisdiction and alleged that the suit should be tried in the District of Monghyr where both parties reside. One of the grounds upon which the plaintiff claimed that the suit should be tried in Gaya was that the agreement that the expenses of the suit should be borne proportionately was concluded at a place called Kashi Chak in the District of Gaya. The learn-

ed Subordinate Judge noted that on the whole he disbelieved the story of the plaintiff's witnesses that the agreement took place at Kashi Chak, but he overruled the objection made by the defendant 1 to the jurisdiction upon other grounds. The learned Subordinate Judge in his final judgment in the case may, if the point be pressed, be said to have held that an agreement to pay a proportionate share of the expenses of the case was actually concluded; but his finding in this respect is very obscure. He awarded the plaintiff a decree for part of the sum claimed by her. Against this decision defendant 1 appealed. The learned District Judge dismissed the appeal. In doing so he has come to no finding as to whether there was an agreement between the plaintiff and defendant 1 that defendant 1 should pay a proportionate share of the expenses of the irrigation suit. The judgment of the learned District Judge appears to proceed upon the ground that the defendant was as interested as the plaintiff in bringing the irrigation suit, that her husband admittedly signed and verified the plaint and also a subsequent amendment to the plaint, that the parties were not shown to have been at that time on bad terms and that there was no evidence to show that there was any coercion or that the plaintiff promised to bear all the costs. The defendant 1 now appeals to this Court.

It is contended on her behalf that the grounds given by the learned District Judge are not sufficient to support his judgment. We are of opinion that the judgment cannot be supported upon these grounds. Where two plaintiffs join in the institution of a suit and the suit is conducted by one plaintiff alone and the entire expenses of the suit are borne in first instance by that plaintiff, a suit for contribution by him against the other plaintiffs could succeed only upon one or other of three grounds: first, that there was an agreement between the two plaintiffs that the expenses should be borne proportionately, or secondly, that the plaintiffs has joined in engaging counsel or vakil and that after the joint engagement of counsel or vakil the one plaintiff had paid the counsel or vakil on behalf of both, thirdly, under the provisions of S. 70, Contract Act, which lays down that where a person lawfully does anything for another person not intending to

do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former. Taking the last ground first, in the present instance the suit was dismissed and it is not possible to say that the defendant enjoyed any benefit. In regard to the second point the plaint does not proceed upon the ground of a common engagement of vakil, and the ground does not appear to have been taken before either of the Courts below. There remains then only the first ground, namely, that an agreement was entered into between the parties that the expenses of the suit should be borne proportionately. As we have said the judgment of the first Court was obscure upon this point, but it is possible to say that the first Court intended in the final judgment to hold that such an agreement did take place.

There is no finding upon the point in the judgment of the Court of first appeal. In that Court the plaintiff was a respondent and, therefore, to some extent may be excused for his failure to press the learned Judge for a finding on the point, specially as the learned Judge appears to have been in his favour upon another ground. We are of opinion, therefore, that in the interest of justice the case should be remanded for a finding upon the point. We set aside the judgment and decree of the learned District Judge and we send the case back to him and direct him to come to a finding as to whether there was an agreement between the plaintiff and defendant 1, as alleged in para. 4 or 5 of the plaint, that the expenses of the irrigation suit should be borne proportionately between them. If he comes to a finding in favour of the plaintiff on this point, he will then give a decree to the plaintiff in the terms of the decree which we have just set aside. If, however, he finds no such agreement took place, the plaintiff's suit will be dismissed. Having regard to the fact that it is owing to the failure of the respondent to press this point in the Court of first appeal that this remand is necessary, we direct that the respondent do pay the costs up to date. The costs of the proceedings after remand will abide the result. We remand the case for final disposal by the District Judge in accordance with these directions.

Atkinson, J.—I agree.

V.S./R.K. *Case remanded..*

A. I. R. 1916 Patna 275

CHAPMAN AND ATKINSON, JJ.

Bhagat Mal Sahu — Defendant—Appellant.

v.

Abdul Karim and others—Plaintiffs—Respondents.

First Appeal No. 245 of 1913, Decided on 7th April 1916.

(a) Hindu Law—Debts—Son's pious duty—This duty to pay is irrespective of family necessity or consent.

Under Hindu Law, the liability of a son to pay his father's debt arises from a moral and religious duty, and is not affected by the absence of the son's consent, the son being an adult at the time, or by family necessity; 9 Cal 495, *Rel on*; 6 Cal 749, *Ref*. [P 275 C 2]

(b) Hindu Law — Debts — Father—Immorality—Son is not liable for immoral debts—Connexion must be established—Nature of proof stated.

A son is however exempt from liability if he can establish that the father was guilty of applying the money borrowed for an immoral purpose. The connexion between the raising of the money and its expenditure for a specific immoral purpose must be shown, though direct proof is not necessary that it was not spent on any particular person: 14 Bom 320 and 36 Bom 68, *Rel on*. [P 276 C 1]

Guru Saran Prasad—for Appellant.*Khurshed Hasnain*—for Respondents.

Atkinson, J.—This is an action brought by the plaintiff to recover Rs. 2,400 by way of principal and a sum of Rs. 4,008 by way of interest on a mortgage-bond, dated 29th December 1899. The bond purports to be made by the defendant's father and apparently the money was raised for the purpose of extinguishing three prior existing mortgage-debts on respective bonds, dated 20th February 1896, 7th December 1896 and 16th September 1899. These bonds were for various amounts and it would appear that irrespective of interest, the total amount of moneys raised by way of principal by these bonds would be about Rs. 1,200 to Rs. 1,500. The bond sued on is for Rs. 2,400 with interest. The original mortgagor is dead and the defendants are his two sons. The original mortgagee is also dead and this suit is brought by the plaintiff as his representative to recover the money due on this mortgage-bond for the amount of Rs. 6,408. It will be noticed that this appeal is brought against the decision of the learned Subordinate Judge by one defendant only, that is defendant 1, who is the eldest son of the original mortgagor. Defendant 2, although he joined in filing a written statement on behalf of himself

and his brother, does not seriously contest the decision of the learned Subordinate Judge and expresses his willingness to pay Rs. 3,000 in discharge of his liability. Thus the appeal before us is simply an appeal by one of the parties liable as a son of the original mortgagor. He seeks to resist liability for this debt on three grounds. First of all, that he and his father were separate in mess and residence and that in fact the joint property which had previously belonged to his father himself and his brother had been severed or partitioned and that by reason of this he is not liable for the antecedent debts of his father. Secondly, it is contended that if the joint property has not been severed, he is within the class of exception which provides that a son is not liable according to Hindu law for the debts of his father if the debts be contracted for an immoral purpose. And thirdly, he contends that in point of law at the time that the mortgage-bond was made and given he was then of age, and that his father executed the bond without his consent, express or implied, and that consequently he is not liable, it not having been shown that the debt was one incurred for any family necessity.

On the first question we are of opinion that there was no evidence given that there had been any partition of a joint property between father and sons. Taking the third point next we are of opinion that the case cited, *Upooroop Tewary v. Lalla Bandhjee Suhay* (1), in support of that argument is of little weight. It seems to have been overruled, if not distinctly qualified, by the later case reported as *Bosa Kooer v. Hurry Dass* (2). The only question which then remains to be considered is, whether or not the money raised in this case was raised for some immoral purpose. Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation; and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose. The only evidence adduced in this case for the purpose of showing that the money was applied for an immoral purpose is the evi-

1. (1881) 6 Cal 749.

2. (1883) 9 Cal 495.

dence of defendant 1 himself, which merely says in general terms "my father used to drink and keep women and borrowed money for the purpose."

That is the only affirmative evidence given by the defence on that issue. It in no way connects the money raised under this mortgage-bond now sued on which the keeping of any particular woman, nor in the evidence of the defendant is the name of a any woman suggested. The evidence seems very elastic, indefinite, and inconclusive. Some little corroboration however is given to the defence pleaded by the evidence of witness 6 for the plaintiff, in which he says that the mortgagor kept a woman and that a dispute arose between him and his sons on account of this prostitute. There, too, no connexion is shown between the raising of the money and its expenditure for any specific immoral purpose. We have considered the cases that have been decided. The cases reported as *Chintamanrav Mehendale v. Kashsnath* (3) and *Dattatraya Vishnu Dhamankar v. Vishnu Narayan Dhamankar* (4) are directly in point and we think that while you need not have direct proof that the money was raised to be spent to any particular person, one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way, by reasonable legal proof, it must be shown that there is a connexion between the debt and the immoral purpose. We are unable on the evidence here to say that there has been any reasonable proof connecting the debt incurred in this case with the immoral purpose alleged and therefore we must confirm the decision of the learned Subordinate Judge with costs.

Chapman, J.— I agree.

By the Court.—We allow the hearing-fee seven gold mohurs.

V.S./R.K.

Appeal dismissed.

3. (1890) 14 Bom 320.

4. (1912) 36 Bom 68=12 I C 949.

A. I. R. 1916 Patna 276 (1).

CHAMIER, C. J. AND KINGSFORD, J.

A. W. N. Wyatt & others—Appellants.

v.

Sheo Gobind Sahu—Respondent.

Second Appeal No. 524 of 1915, Decided on 4th July 1916.

(a) Bengal Tenancy Act (8 of 1885), S. 88—Consent of landlord in writing is necessary for division of holding.

Per *Kingsford, J.*—The division of a holding and the distribution of rent are not binding on the landlord unless he gives his consent in writing: 14 W R 211; 25 W R 19; 25 Cal 531 (F B) and 21 I C 420, Dist. [P 278 C 1]

(b) Occupancy holding—Transfer—Consent—Rent collector's consent does not bind master—Rent receipt does not amount to consent.

Per *Chamier, C. J.*—It is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. [P 277 C 2]

Giving receipts for rent does not in itself amount to consenting to a transfer. P 278 C 1

P. Kennedy and Saroshi Chandra Mitter—for Appellants.

Ganesh Dutt Singh and Siva Nandan Rai—for Respondents.

Chamier, C. J.—The first appellant, who is the owner of a large indigo concern, is mokararidar of Mauza Madhuban Bendiban in which one Khedu Rai had an occupancy holding of about 8 bighas.

In 1902 Khedu Rai sold 5 bighas of his holding to the respondent and placed him in possession. In 1913 Khedu Rai died without heirs. Appellant 1 then took possession of the 3 bighas which had remained in Khedu Rai's possession and let the 5 bighas to appellants 2 and 3. The respondent having refused to give up possession the present suit was brought. The respondent admitted that there was no custom in the village justifying the transfer of an occupancy holding, but he pleaded that appellant 1 through his manager had expressly consented to the transfer before it was effected and had also recognized it subsequently. The respondent's sworn statement that he obtained the express consent of the manager was contradicted by the manager and has been disbelieved. But both the Courts below have held that the transfer was subsequently recognized. The evidence of recognition consists of (1) four receipts for the payment of rent by the respondent, (2) a letter from one patwari to another stating that the rent of the 5 bighas would be paid by the respondent (Ex. A-1), (3) an order of the Assistant Manager of an outlying sub-agency allowing him to cut down a dry tree standing on the land and (4) the fact that the respondent grew indigo on part of the land and sold it to the mokararidar.

The evidence falling under heads (3) and (4) appears to me to be of no importance whatever. The order of the Assistant Manager regarding the tree seems to have been passed as a matter of course without any inquiry and without any intention of thereby recognizing any right in the respondent as transferee of the holding. The tree was sold for 8 annas, of which 4 annas were paid to the mokaridar. The same order would probably have been passed if the respondent had been sub-tenant of the plot. The respondent in his evidence admitted that the indigo was "grown in Khedu Rai's name" and that the indigo account was in the same name. As regards the receipts it must be noted that the respondent's name was never entered in the books of the mokaridar. Khedu Rai's name alone appeared in those books and all sums received were credited to him alone. The patwari at the sub-agency is found to have given the respondent in the course of 11 years 4 receipts of which one is in the name of "Khedu Rai marfat Sheogobind Shah baidar", another is in the name of "Khedu Rai banam Sheogobind Shah baidar", and the remaining two are simply in favour of Sheogobind Shah. The respondent's own account of the payment of rent is, "all the rent was paid in the name of Khedu Rai and receipts were granted in his name." This statement shews that he was well aware that Khedu Rai alone was treated as the tenant of the land. There is no evidence as to the occasion on which the letter (Ex. A-1) was written. Patwaris are interested in recovering rent for their masters and are probably only too glad to receive the rent from any one claiming to represent the recorded tenant. The letter in question seems to have been intended only to help a brother patwari to recover the rent of the holding.

The evidence of the manager, which has been accepted, shews that he cannot have had any intention of recognizing the transfer for he was not even aware of it. If I had had to decide this case as a Court of first appeal I should not have hesitated to hold that the landlord's consent to the transfer had not been established. But as this case comes before us in second appeal we must accept the findings of fact, if any, recorded by the lower appellate Court, and it has been suggested by the learned vakil for the respondent that

the finding of the District Judge that the landlord consented to the transfer is a finding of fact. The finding of the District Judge is that express consent by the landlord has not been proved but that consent by his authorized agent has been proved. I take it that the learned Judge is referring to the patwari and the Assistant Manager. So far as the order of the Assistant Manager is concerned, I hold that it does not amount to consent to the transfer whatever his authority may have been. Assuming that the receipts granted by the patwari show that he himself consented to the transfer, we have to see whether he had authority to consent to the transfer on behalf of the landlord. The position and duties of a patwari are well-known.

He is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary or incidental to his express authority. It is not suggested that he had authority to manage any part of the property. In my opinion it is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. I cannot accept the suggestion which has been made that it lay on the landlord in this case to prove that the patwari had not authority to consent to the transfer. Landlords would be in a very difficult position if it were held that patwari and other underlings should be presumed, till the contrary is shewn, to have the power to sign away their masters' rights. Nor, in my opinion, do the receipts shew that even the patwari himself consented to the transfer.

Two of these shew only that on two occasions in the course of 11 years he accepted rent from the respondent. The other two seem to me to shew that the patwari intended to give credit for the payment to Khedu Rai alone. In my opinion the evidence which has been accepted by the District Judge in this case does not shew that the first appellant consented to the transfer to the respondent. I would, therefore, allow this appeal and decree the claim for possession with costs in all three Courts. The Court of first instance should ascertain the

amount of mesne profits due to the appellant and pass a decree for the same.

Kingsford, J.—I agree that this appeal should be allowed. It appears that in the year 1902 Khedu sold to the defendant 5 bighas out of 8 bighas which comprised the holdings. Thereafter the defendant, according to his rent receipts, paid the proportion of the rent for which under the deed of sale he was liable. There was, therefore, a division of the holding and a distribution of the rent, which under the provision of S. 88, Ben. Ten. Act, were not binding upon the landlord because not made with his express consent in his writing. On the contrary it appears that the landlord expressly refused to enter the defendant's name in the jamabandi. The rulings relied upon by the learned vakil for the respondent are not applicable to this case. Those of *Bharut Ray v. Ganga Narain Mohapat-tur* (1) and *Ooma Churn Banerjee v. Rai Luckhee Debia* (2) are previous to the passing of the Act. That of *Pyari Mohun Mukhopadhyaya v. Gopal Paik* (3) deals with a case where the receipts themselves showed that the tenant's name had been registered in the landlord's sherista. In *Abinash Chandra Chowdhury v. Purnananda Khan* (4) the receipts were held to amount to express consent to the subdivision, because they indicated that the allotment of different shares and apportionment of the rent had received the landlord's approval. The present case is clearly distinguishable, since the receipts cannot be construed as a consent nor do they suggest any inference that there was a consent and as a matter of fact consent had been refused.

V.S./R.K.

Appeal allowed.

1. (1870) 14 W R 211.
2. (1876) 25 W R 19.
3. (1898) 25 Cal 531 (F. B.).
4. (1913) 21 I C 420.

A. I. R. 1916 Patna 278

ROE AND JWALA PRASAD, JJ.

Nirit Lal Jha—Judgment-debtor—Appellant.

v.

Kalanand Singh and another—Decree-holders—Respondents.

Misc. Appeal No. 510 of 1914, Decided on 7th July 1916, against order of Sub-Judge, Purneah, D/- 15th August 1914.

Limitation Act (9 of 1908), Art. 182—Amended decree—Execution—Time runs

from date of order and not date of actual amendment.

The date of amendment of a decree is the date on which the order of amendment is passed, and not the date on which it is actually amended.

An application for the execution of a decree presented more than three years after the date of the order amending the decree, but less than three years after the actual amendment, is barred by limitation. [P 278 C 2]

Kulwant Sahay—for Appellant.

Sailendra Palit—for Respondents.

Judgment.—The facts set forth in the order-sheet of the lower Court are as follows:

"The Court decreed the suit granting all the prayers of the plaintiff. But the decree as framed was silent as regards recovery of possession. The plaintiff prayed for an amendment of the decree on 27th August 1907; his prayer was disallowed by this Court on 7th December 1907 on the defendant's objection, but granted by the High Court on 13th July 1908. The order was communicated to this Court on 22nd September 1908 but through inadvertence the decree was not actually amended until 24th August 1912, when it was amended on the plaintiff's petition filed on 13th August 1912. The plaintiff-decreeholder now executes the decree,"

the date of his application being 12th July 1914. Upon this date the judgment-debtor contended in the lower Court that the decree was barred by limitation. That objection was set aside and execution was continued. Against continuance of execution the judgment-debtor appeals to this Court. We have no hesitation in saying that execution was time-barred. The date from which limitation ran was three years from the date of the amendment of the decree. In this case at any rate the date of the amendment of the decree must clearly be the date of the order of the High Court amending it. Ordinarily a decree bears the date on which judgment is delivered in a case, and it would seem that analogously the date of amendment of a decree bears the date of the judgment ordering the amendment. It is not necessary to go deeply into this point, for in the present case the decree was amended by the High Court and no formal action by the Subordinate Judge could in itself be regarded as an amendment of the decree. We hold that the date of the amendment of this decree was 13th July 1908 and that upon the date of the application execution was barred by limitation. Further execution cannot, therefore be taken. The appeal is decreed with costs. Hearing-fee five gold mohurs.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 279

MULLICK AND ATKINSON, JJ.

Hemraj Champa Lal—Creditor—Appellant.

v.

Ramkishen Ram and others—Respondents.

First Appeal No. 172 of 1915, Decided on 21st December 1916, against original order of Dist. Judge, Gaya, D/- 22nd January 1915.

(a) Provincial Insolvency Act (1907), S. 36—Transfer by insolvent—Avoidance of—Nature of proof required for, stated.

A person impeaching a transfer under S. 36, Provincial Insolvency Act, has only to prove that the transfer was effected within two years prior to the act of insolvency or the declaration of insolvency. If that is shown, the onus is shifted upon the transferee to establish the bona fides and good faith of the transaction which he seeks to maintain and uphold: 29 I C 814 and 37 I C 684, *Rel. on.* [P 280 C 1]

(b) Provincial Insolvency Act (1907), S. 36—Considerations affecting S. 53—Transfer of property do not apply to S. 36—Transfer of Property Act (1882), S. 53.

Considerations affecting S. 53, T. P. Act, do not apply to S. 36, Provincial insolvency Act. Though transferees in good faith and for valuable consideration are protected under both sections, it is not necessary to prove under S. 36 of the latter Act that the transfers were made with intent to defeat or delay creditors or subsequent transferees. All that is required is that it must be made within two years of the adjudication of the insolvency of the debtor. [P 280 C 1]

(b) Provincial Insolvency Act (1907), S. 36—Receiver only can set Court in motion.

The receiver is the only person who can set the Court in motion under S. 36, Provincial Insolvency Act. On his refusing to act, creditors may apply on their own behalf: *Ex parte Kearsley*; *In re Gencse*, (1886) 17 Q B D 1; *Rose v. Buckett*, (1901) 2 K B 449 and *Ex parte Moore, Slobodinsky, In re*, (1903) 2 K B 517, *Ref.* [P 281 C 2]

Haradhan Chatterjee and *Uma Charan Laha*—for Appellant.

Kulwant Sahai, *Sarat Ch. Mukerji*, *Guru Saran Prasad*, *Siveswar Dayal* and *Hari Bhusan Mukerji*—for Respondents.

Atkinson, J.—This miscellaneous appeal comes before us by way of an appeal from the order of the District Judge of 21st January 1916 refusing to inquire into the validity of certain deeds of transfer executed by the insolvent in this matter on the ground that they were invalid transfers and executed for the purpose of preventing the debtor's property from being realized for the benefit of the creditors of the insolvent. The argument mainly before us has turned upon the question of the construction to

be put upon S. 36, Provincial Insolvency Act (Act 3 of 1907), as to upon whom the onus of proof lies relative to any transfers executed by an insolvent within two years prior to his declaration of insolvency. The insolvent was heavily indebted, and on 28th May 1913, applied to have himself declared an insolvent, and on 7th November 1913, the Court was pleased to declare the insolvent an insolvent person. Long prior to his application to be declared an insolvent the insolvent was heavily indebted to numerous persons whose debts were contracted in the years 1911, 1912 and 1913; and the first creditor on the list set out in Sch. A to the insolvent's petition is the applicant in the present case, a man called Hemraj Champa Lal, for the sum of Rs. 7,000, whose debt was established by a decree in a suit in 1911. There were various other creditors whose debts all appeared in the schedule, amounting to a total sum of Rs. 14,677; and in Sch. B to the petition, the petitioner sets out the total amount of assets in hand on 28th May 1913, when the petition was filed, showing assets to the extent of Rs. 3,387-5-6. Prior to the declaration of insolvency the insolvent disposed of some valuable property, some pukka houses of which he was the proprietor in Gaya, and three deeds of transfer were executed relative to the same and they are now impeached, and the three transfers bear date 6th July 1912, 4th August 1912 and 6th February 1913, all of which transfers were made and executed by the insolvent within two years prior to the declaration of insolvency.

The applicant here, the main creditor, comes forward under S. 36, Provincial Insolvency Act (Act 3 of 1907), and seeks to have these transfers set aside on the ground that they are not bona fide, that they were not made for valuable consideration, and that these transfers were effected, if at all, for a consideration that was grossly inadequate, and that thus the creditors were hindered and prevented from realizing the entire assets and estate of the insolvent. The applicant before the learned Judge adduced some four or five witnesses only to prove that the transfers which he sought to impeach were transfers made within two years prior to the act of insolvency; and he contended that having given such proof, the onus was shifted on to the transferees

to establish the bona fides of their transfers. The learned Judge seems to us not to have carefully considered the legal obligations imposed by S. 36. To our mind it is perfectly clear that if a transaction by way of transfer of an insolvent's property takes place within two years prior to the act of insolvency or to the declaration of insolvency, that then nothing more is necessary on the part of the person impeaching the transaction than to prove that it took place within two years prior to the act itself; and that having done so, the onus is shifted upon the transferee to establish the bona fides and good faith of the transaction which he seeks to maintain and uphold. Ample authority is forthcoming for that proposition, and we think the decision in *Nilmoni Chowdhuri v. Basanta Kumar Banerjee* (1) is an authority which we consider we ought to adopt. And we are fortified in that view by the decision in *Muhammad Habidullah v. Mushtaq Husain* (2), where two Judges of the Allahabad High Court, Walsh, and Sunder, Lal JJ., both held that considerations affecting S. 53, T. P. Act, did not apply to S. 36, Provincial Insolvency Act, in these words, which we adopt as our own:

"Provisions analogous to those contained in S. 36 of the Act, are to be found in S. 47 of the English Bankruptcy Act of 1883, and Statute 13 Elizabeth Ch. V, and 27 Elizabeth Ch. IV. The language of each of these Statutes is slightly different. Each case, therefore, must be considered in the language of the Statute concerned. In our opinion S. 36, Act 3 of 1907, is wider in its scope than S. 53, Act 4 of 1882. Under the latter section transfers made with the intent to defeat or delay creditors or subsequent transferees are made voidable at the instance of the creditors so defrauded or defeated, and it is also declared that where such transfers have the effect of defeating or delaying creditors they would be presumed to have been made with that intent, if they are made gratuitously or for grossly inadequate consideration. Under S. 36 of the Act no such intent is necessary. All that is required is that it must be made within two years of the adjudication of the insolvency of the debtor. Under both these sections transfers in good faith and for valuable consideration are protected. S. 36 also protects transfers 'made before and in consideration of marriage.' We think it is, therefore, not necessary for Dr. Sen to avail himself of the provisions of S. 53, T. P. Act."

Accordingly we adopt that view of the law and we decide the construction of S. 36 accordingly. Mr. Kulwant Sabai,

who appears on behalf of one of the transferees, urges with great force that S. 36, Provincial Insolvency Act of 1907 contemplates a proceeding at the suit of the Receiver appointed by the Court to administer and realize the assets of the insolvent. This application is preferred, not by the Receiver, but by one of the creditors, and it is urged that no individual creditor has any locus standi under S. 36 of this Statute that would warrant the Courts in holding that he could pursue any independent proceeding, irrespective of the Receiver's position in the matter. Now, in this case the Receiver was appointed under S. 16 by the District Judge, and the duties and powers of Receivers are prescribed by S. 20, and in Cl. (d), S. 20, one of his duties is "to institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent;" and under this Statute, as under the English Bankruptcy Acts, the property of the debtor vests in the Receiver upon the adjudication of insolvency. Now, the English Statutes are in precisely the same terms as the Statute I have referred to, and there is abundance of authority to show that once the Statute provides that the property is to vest in the Receiver, the Receiver becomes a trustee for the general body of creditors to safeguard their interests in the realization of the assets of the insolvent; and that the duty is primarily upon him to recover the assets and to take all proceedings that may be necessary to recover the property of the insolvent for the benefit of his creditors. So much is this so that in the case of *Ex parte Kearsley In re Genese* (3) it was laid down that a creditor could not take any proceedings independently of the Receiver without application to the Court and only then if the Receiver refused. The learned Judge Cave, J. says:

"The proper course for creditors, if the trustee refuses to act, or to allow his name to be used (a trustee in the English Acts is the same as the Receiver here) is for them to come to the Court and apply for leave to use the name of the trustee on giving him an indemnity against costs. On such an application the Court will consider the nature of the proposed proceedings, and, if satisfied that there are prima facie grounds for allowing the creditors to proceed, will grant the application."

To the same effect the law will be found stated in para. 235 of Lord Halsbury's Laws of England, Vol. 2, under

1. (1915) 29 I C 814.

2. (1918) 37 I C 684.

3. (1886) 17 Q B D 1=55 L J Q B 325.

Bankruptcy, which describes the classes of property which vest in the Receiver as follows:

"The rights falling under Class 2 (that is, the rights which have accrued by virtue of insolvency may be enforced by action by the trustee, unless the cause of action is one which from its nature does not vest in the trustee, or to the benefit of which the estate is not entitled. Rights of action which vest in the trustee by virtue of the superior title which in some cases is conferred on him by the Bankruptcy Acts, as, for instance, the right to recover money or property transferred by way of fraudulent preference or the right to recover property in the reputed ownership of the bankrupt, may be enforced by the trustee by action. All rights of action which relate directly to the bankrupt's property and can be turned into assets for the payment of debts pass to the trustee."

And in *Rose v. Buckett* (4), at p. 454 of the Report, Lord Collins lays down the rule of law as to what property vests in a Receiver. He says:

"The general principles which determine whether a cause of action does or does not pass to the trustee in bankruptcy are well settled, and may be stated in the language of Parke, B, in *Becham v. Drake* (5). What then is the proper construction of this section of the Act. . . . according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors, . . . but all such as would be assets in their hands for the payment of debts.....and all which could be turned to profit."

So to a like effect is the case reported as *Ex parte Moore, Solobodinsky, In re* (6). And at p. 525, Wright, J., says:

"The trustee relies on the Bankruptcy Act, which by S. 43 provides that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the first act of bankruptcy committed by him within the statutory period of three months; and by S. 44 his property vests in his trustee as from the date of that previous act of bankruptcy."

If the property vests in the trustee, then he is the person primarily entitled to recover it; or if the property has been made away with by the insolvent, the trustee is the person primarily entitled to follow it and to recover it back for the benefit of the creditors. In para. 475 of Lord Halsbury's *Laws of England*, Vol. 2, the position of the trustee is summarised in appropriate language. To use the word "trustee" here as synonymous with the "Receiver" appointed under the statute we have to consider:

"The trustee in a bankruptcy ought not to make an application himself, or allow an application to be made in his name, to recover property alleged to have been given to a creditor by way of fraudulent preference, except for the benefit of all the creditors; he ought not to do so simply for the purpose of benefiting a single creditor."

To us it appears abundantly clear that what was contemplated by the procedure provided for by this statute was, that the Receiver was the person to impeach any fraudulent transfer or conveyance by the insolvent of his property. If the Receiver refused to do so, then it would be open to any creditor to apply to the Judge for leave to institute a proceeding under S. 36 on his own behalf and on behalf of the other creditors. But until the Receiver refuses or declines to act, no one else can do so, because he is the person to set the proceeding under S. 36 in motion. Accordingly, in our opinion, this application in the present form is not sustainable; but having regard to the course which we intend to pursue, we will direct that the name of the present applicant be struck out and that the name of the Receiver be substituted for it, and that then the application as amended in that form shall be remanded to the learned District Judge, having regard to our direction on the point of law which we have now given by this decision, for determination of the following questions:

1. Are the three transfers impugned real and genuine transfers, or are they fictitious transfers made to protect the property from the creditors? 2. What was the market value of the property conveyed in each case on the date of the transfers? 3. Were the transfers impugned made in good faith and for valuable consideration? 4. If not, was there want of good faith on the part of the transferee? The Judge has now clearly laid down for him the necessary law dealing with the onus of proof, and upon his answers to these questions remanded he will determine the rights of the parties. Having regard to the way in which the case has been argued, we are of opinion that each party should bear their own costs.

Mullick, J.—I concur.

V.S./R.K.

Case remanded.

4. (1901) 2 K B 449=70 L J K B 736.

5. (1849) 2 H L C 579=9 E R 1213.

6. (1903) 2 K B 517=72 L J K B 883.

A. I. R. 1916 Patna 282 (1)

CHAMIER, C. J. AND SHARFUDDIN, J.
Balaram Naik—Appellant.

v.

Kanhai Bharan Mahapatra—Respondent.

Second Appeal No. 151 of 1915, Decided on 17th May 1916, from the order of Offg. Dist. Judge, Cuttack, D. 23rd May 1914.

Civil P. C. (1908), O. 34, Rr. 3 and 5—Application for final decree for foreclosure or sale is governed by Limitation Act. (1908), Art. 181.

An application for a final decree for foreclosure or sale is an application under the Code of Civil Procedure, 1908, for it is made under O. 34, R. 3 or R. 5, which expressly requires an application: 29 I. C. 120, *Ref.* [P 282 C 2]

An application for such a final decree presented after the passing of the Code of Civil Procedure, 1908, and the Lim. Act, 1908, is governed by Art. 181, Lim. Act, 16C. 799, *Foll. 37 Cal. 796, Doubtful, 38 Cal. 913 (P C) A. I. R. 1914 P. C. 65 (P. C.); and A. I. R. 1914 P. C. 66, Ref.*

[P 282 C 1]

On 6th July 1908 plaintiff obtained a conditional decree for sale of certain property. In March 1913 he applied for a final decree.

Held: that the application was barred by Art. 181, Sch. 1 to the Lim. Act. 1908. [P 282 C 1]

Girish Chandra and Subodh Chandra Chatterjee,—for Appellant.

Chamier, C. J.—On 6th July 1908, the appellant obtained a conditional decree for sale of certain property. In March 1913 he applied for a final decree. The respondent pleaded that the application was barred by limitation under Art. 181, Sch. 1, Lim. Act. The Mun-sif disallowed the plea, but on appeal the District Judge allowed it and dismissed the application as barred by limitation. The appellant relies upon the judgment in the case of *Madha Moni Dasi v. Pamela Lambert* (1). In that case it was said that such an application is not governed by Art. 181, but as pointed out in the later case of *Amolak Chand Parak v. Sharat Chandra Mukerjee* (2), at (p. 921 I L R 38 Cal.) of the report, that was not a decision of the question, for the learned Judges held that the Code of Civil Procedure, 1908, did not apply to the case, and if that was so, the question of the applicability of Art. 181 did not call for a decision. If, however, there was a decision of the question, it is considerably weakened by the fact that the learned Judges started with the assumption that before the passing of the Code of 1908, there was no rule of limitation for such

1. (1910) 37 Cal 796=6 I. C. 537.

2. (1911) 38 Cal. 913=11 I C 943.

an application. That position is untenable in view of the decision of their Lordships of the Privy Council in *Batuk Nath v. Munni Dei* (3) and *Abdul Majid v. Jawahir Lal* (4) that an application for an order absolute under the Transfer of Property Act was governed by Art. 179, Sch. 2, Lim. Act 1877.

Under the Code of Civil Procedure, 1908 the holder of a preliminary decree for sale or foreclosure applies not for an order absolute for sale but for a final decree. It is clear that an application for a final decree for foreclosure or sale is an application under the Code of Civil Procedure, for it is made under O. 34, R. 3 or R. 5 which expressly requires an application. In my opinion there can be no doubt that an application for such a final decree, presented after the passing of the Code of Civil Procedure, 1908, and of the Limitation Act, 1908, is governed by Art. 181 of the present Lim. Act. That was the view taken by the Madras High Court in *Tathara Nannabha Chetty v. Kuppall Krishnammal* (5). On the question of the applicability of the Code of Civil Procedure to the present application, it is sufficient to refer to the case of *Krishna Bar v. Ranamoyi Debi* (6). I would dismiss this appeal but without costs, as the respondent is not represented.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

3. A I R 1914 P C 65=23 I C 644=36 All 284 =41 I A 104 (P C).

4. A I R 1914 P C 66=23 I C 649=36 All 350.

5. (1912) 16 I C 799.

6. (1915) 29 I C 120.

A. I. R. 1916 Patna 282 (2)

CHAMIER, C. J. AND JWALA PRASAD, J.
Balli Singh and others—Defendants—Appellants.

v.

Bindeswari Tewari and others—Plaintiffs—Respondents.

Second Appeal No. 491 of 1912, Decided on 7th April 1916, from decision of Dist. Judge, Shahabad, D/- 1st November 1911.

Mortgage—Plaintiff purchasing property in execution of his mortgage decree—Defendant purchasing same in sale for arrears of revenue—Suit for possession by plaintiff—Plaintiff was not entitled to possession but to put property to sale if defendant did not redeem.

A mortgagee purchased the mortgaged property in execution of the decree upon his mortgage. In the meantime the property had been sold off for arrears of revenue. The mortgagee-purchaser sued the purchaser at the revenue sale for possession:

Held: that the plaintiff was not entitled to possession, but was entitled to put the property to sale if the defendant did not redeem him within the specified period. [P 284 C 1]

Pravash Chandra Mitter and Susil Madhab Mullick—for Appellant.

Chandra Sekhar Prasad Singh—for Respondents.

Judgment.—It is necessary in this appeal to state a few facts in order to make clear the question which we have to decide. In February 1900 the ancestor of the two ladies, impleaded in the present suit as defendants 1 and 2, mortgaged to the plaintiff Bindesweri Tewari, a 2-annas share in Mauza Pepra, a 2-annas 8-pies share in Mauza Jalalpur, a 2-annas 8-pies share in Mauza English and a garden in Arrah. The plaintiff brought a suit against the two ladies upon the mortgage and obtained a decree, in execution of which he purchased the mortgaged property and obtained formal delivery of possession in 1906, but in the meantime the mortgaged property, except the garden at Arrah, had been sold for arrears of revenue and had been purchased by defendants 3 to 12. The present suit was instituted in November 1907. The plaintiff's case was that the revenue sale had been procured by fraud and was null and void as against him. That point has been held against him and no question now arises as to it. The revenue sale must be taken to have transferred the property to defendants 3 to 12. The plaintiff further contended that if the revenue sale was valid, defendants 3 to 12 had purchased the shares in the villages subject to the plaintiffs' mortgage. It is conceded on all hands that in the circumstances the purchase at the revenue sale was subject to the plaintiff's mortgage. The plaintiff claimed in his plaint possession of the shares in the three villages as against the purchasers at the revenue sale. Plaintiff compromised with the defendants other than 3, 6 and 9, and has obtained a decree against them which cannot now be questioned. Defendant 6 in the course of the suit transferred all his interest to defendant 9, so that we are concerned now only with the plaintiff and defendants 3 and 9.

It appears that at the revenue sale a much larger share in each of the villages was put up to auction than was covered by the mortgage. It is unnecessary to go into all the details. It is sufficient to state

with regard to the purchase that defendant 3 purchased a 3-pies 15-krants share in Pepra subject to the plaintiff's mortgage, and defendant 9 has become the proprietor of a 9-pies share in Pepra and 1-anna share in Jalalpur subject to the plaintiff's mortgage. The two defendants with whom we are now concerned conceded in this Court at all events that the property was liable for its proportionate share of the amount due on the mortgage. The amount chargeable against the shares of these two defendants was ascertained by the first Court and the calculation must be taken to be correct. The only alteration made in the first Court's decree by the lower appellate Court was the addition of interest to the amounts found chargeable against the different shares. Both Courts below have given the plaintiff a decree for possession in case the defendants fail to pay within six months their proportion of the sum due on the mortgage. In second appeal it is contended that the plaintiff is not entitled to a decree for possession, but is only entitled to a decree for sale of the property in case the defendants do not redeem the property purchased by them by payment of their proportionate amount of the mortgage money. On behalf of the plaintiffs-respondent it is vigorously contended that in a case of this kind the plaintiff is entitled to a decree for khas possession, and we were referred to a number of cases on the subject. In all the cases referred to, it will be found that the person occupying the position of the plaintiff in the present suit was entitled to possession of the mortgaged property at the date of the suit. I take a common instance. *A* makes a simple mortgage in favour of *B* and subsequently a similar mortgage in favour of *C*. *B* sues *A* on the mortgage without impleading *C*. He obtains a decree, brings the property to sale and purchases it himself.

By that purchase he acquires the right to possession of the mortgaged property which up to that time had been enjoyed by the mortgagor. *C*, not having been made a party to the suit brought by *B*, had no opportunity of redeeming *B*, and in a subsequent suit brought by *B* to enforce possession of the property, *C* must be given an opportunity of redeeming *B*, but if he fails to redeem, *B* will have a decree for possession of the property, not for sale of the property. The reason why

he gets a decree for possession of property is that at the date of the suit he was entitled to possession of the property against all the world. In the present case the suit brought by the plaintiff on his mortgage was brought against the original mortgagors, but the interest of the original mortgagors in the villages with which we are now concerned had at that time passed at the revenue sale to defendants 3 to 12, so that the purchase at the execution sale of the rights of the mortgagor did not give the present plaintiff a right to possession of the property against the purchasers at the revenue sale. Consequently, if defendants 3 and 9 fail to redeem, the plaintiff is not entitled to a decree for possession, but he is entitled to the ordinary remedy of a mortgagee, namely, to have the mortgaged property put up for sale. The result is that the appeal must be allowed in part and the decree of the lower appellate Court varying the decree of the first Court must itself be varied. The suit will stand decreed against defendants 3 and 9 with proportionate costs in the way indicated in the Subordinate Judge's judgment as modified by the judgment of the District Judge, that is, defendant 3 shall pay to the plaintiffs Rs. 152 with interest at the rate of 6 per cent. per annum from the date of the Subordinate Judge's decree up to the date of payment, in order to redeem his 3-pies 15-krants share in Pepra and his 5-pies share in Jalalpur. If the amount is not paid within six months from this date, the two shares just mentioned will be sold.

Similarly defendant 9 shall pay Rupees 394-3-0 with interest thereon at the rate of 6 per cent. per annum from the date of the Subordinate Judge's decree to the date of payment, in order to redeem his 9 pies share in Pepra and his 1-anna share in Jalalpur. If he fails to pay the amount within six months from this date, the shares just mentioned will be put up for sale. The ordinary decree *nisi* for sale will be prepared. There will be no order as to costs in this appeal.

V.S./R.K.

Decree varied.

A. I. R. 1916 Patna 284

CHAPMAN AND ATKINSON, JJ.

Bindeshari Prasad — Defendant — Appellant.

v.

Lekhraj Sahu and others—Plaintiffs—Respondents.

Appeal from Original Decree Nos. 547 and 438 of 1913, Decided on 31st March 1916.

(a) Contract Act (9 of 1872), S. 23 — Agreement to compound non-compoundable offence is wholly void.

A contract founded on the illegal consideration of compounding a non-compoundable offence is wholly void; 40 Cal. 113, *Rel. on.* [P 288 C 2]

(b) Contract Act (9 of 1872), S. 23 — Void and illegal contract carried out — Neither return of consideration nor declaratory relief can be granted—Contract partly void but inseparable from valid—Whole is void.

Where an illegal purpose of a void contract has been executed in whole or in material part by parties who were *pari delicto* in procuring and carrying out the illegality, Court of Equity will not only refuse to enforce the obligations created, or to restore the property given away, under the illegal contract, but will also refuse to grant a relief by way of declaration, inasmuch as in principle there is no distinction between the declaratory relief and the other reliefs. [P 288 C 2]

Per Atkinson, J.—If any part of the consideration supporting a contract is void, it taints the whole contract with illegality; and even though a part of the consideration may be legal yet, if the legal cannot be severed from the illegal, the taint of illegality vitiates the entire contract. [P 288 C 2]

A Court of law will not aid persons in enforcing the performance of an illegal contract, or assist them to recover back property which they have given away under such an illegal contract, when the persons and parties to the contract are themselves *pari delicto* in procuring the illegality. [P 288 C 2]

Per Chapman, J.—Where the illegal portion of an agreement has been carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve his position, if he is not able to show that he has been less to blame than the other. The Courts will not assist an illegal transaction. It is a scandal to assist a plaintiff to recover upon the ground that he has joined in breaking the law, but this will not prevent the Court from intervening to frustrate the illegal purpose before it has been effected, or in any event, from giving relief to the innocent. In particular, the Court will not, in any case, allow a defendant to retain the proceeds of fraud or oppression; and the Court will not refuse protection to those classes of persons whom the law seeks to protect. But in a case in which no such considerations arise, if the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate: 4 Q. B. 309 and 24 Q. B. D. 742, *Rel. upon.*

[P 290 C 1]

(c) **Specific Relief Act (1 of 1877), S. 39—Where parties equally guilty—Discretion under S. 39 may be refused to be exercised.**

The relief of ordering and adjudging the cancellation of a void instrument under S. 39, Specific Relief Act, is entirely discretionary, and a Court of Equity may refuse to exercise the discretionary jurisdiction conferred upon it under the section where it finds that the parties to the instrument are equally to blame.

[P 290 C 1]

(d) **Practice—Appeal—Finding of fact by Judge who heard evidence—Appellate Court should be slow to interfere.**

Judges, on appeal, even though they may have control on questions of fact and even though they might have come to a different conclusion had they been Judges in the first instance, should be slow to reverse the finding of a Judge of first instance who has seen and heard the witnesses examined before him and who, by reason of this fact, is probably better able to come to a right conclusion. [P 288 C]2]

Hasan Imam and Mustafa Khan — for Appellant.

Kulwant Sahai—for Respondents.

Atkinson, J.—This case has been very ably argued on both sides and we have made up our minds and arrived at a very clear conclusion on the facts and the law. The plaintiff in this suit is Lekhraj, and he and his two sons are joint plaintiffs with him, and Bindeshari Prasad is the defendant in the action No. 547 of 1913, and this action is brought claiming the specific relief that the deed of 7th January 1912 may be cancelled and declared null and void. The date of the institution of this suit is 9th March 1912. I may here incidentally mention that after this suit was instituted, Bindeshari Prasad instituted an action against Lekhraj entitled No. 438 of 1913, to have the award of 29th December 1911 filed and judgment passed thereon. I do not think it is necessary to go into the details of the history of the family more than to say that Bindeshari Prasad and his family had a partition of their joint property; and their joint interest in the firms in which they carried on business at Calcutta and Ranigunj became severed. From the year 1901 up to 1906 when the partition took place he and his father, his uncle and his two cousins owned and carried on a joint business at Ranigunj and Calcutta. Apart from the joint property Bindeshari Prasad also had an independent business of his own and the way in which he came in contact with the plaintiff, Lekhraj and his son Mahabir was that they both en-

tered into the employment of the joint firms, in or about the year 1901 so far as Lekhraj was concerned, and in 1903 so far as Mahabir was concerned. Lekhraj was the agent and manager of the firm in Calcutta; and Mahabir was the agent and manager at Ranigunj.

Things went on quietly until after the partition. After the partition in 1906 or January 1907 Lekhraj and his son remained in the employment of Bindeshari Prasad, one acting as foreman or manager at Calcutta and the other at Ranigunj. For a few years after 1906 the plaintiff and his son seem to have got on amicably with their employer Bindeshari Prasad, and it was not until the year 1911 that any form of dispute, so far as we know, arose between them. The cause and origin of the dispute that did arise and develop in June 1911 appears to have arisen out of the acquisition of a $6\frac{1}{2}$ annas share in the village Tandwa. In or about November 1909 Bindeshari Prasad purchased a two annas interest in that village and on the same day Lekhraj purchased a three annas share; and subsequently in February 1910 Lekhraj purchased a further $1\frac{1}{2}$ annas share or interest and in December 1910 another 2 annas, making an entire acquisition of interest by Lekhraj in that village of $6\frac{1}{2}$ annas which represented in capital money Rs. 12,000 as value. It is said, and great emphasis is laid upon this fact, that this property purchased by Lekhraj was for himself as the true and lawful owner thereof; but if he was merely a trustee for Bindeshari Prasad, why should Bindeshari Prasad on the same day have purchased a 2 annas share and Lekhraj a 3 annas share? However, after the completion of this purchases, culminating in December 1910, friction arose, and undoubtedly the friction which arose is manifest from the plaintiff's own plaint by reason of the claim which Bindeshari Prasad was making to the $6\frac{1}{2}$ annas interest in this village; and from that dispute has followed this subsequent litigation. Lekhraj contended that this $6\frac{1}{2}$ annas share was his and formed part of his joint family property. Bindeshari was equally strenuous in contending that Lekhraj was but his agent or trustee. In June 1911 we have Lekhraj joining issue as to this dispute by serving notice on Bindeshari Prasad that he required a partition of this village.

But whether immediately before or immediately after the service of that notice the relationship of master and servant, existing between Bindeshari and Lekhraj and Mahabir, was terminated, whether by dismissal or by escape, does not appear clear. Immediately following this rupture between the plaintiff and the defendant, Lekhraj instituted a suit for the partition of this village. I may mention that his son Mahabir acquired in the village an interest under a lease or ticca of some 3 annas share but this share is in no way concerned in the dispute in this case. Not content with the partition suit, Lekhraj then files or institutes two other actions against Bindeshari Prasad in July 1911, one for arrears of salary alleged to be due by Bindeshari Prasad to him, and another action by his son, claiming the same relief. Lekhraj's action came on for hearing and was dismissed on 12th September 1911. The fate of Mahabir's action for wages due seems never to have been finally determined, and in the same month, July 1911, Lekhraj institutes an action jointly with Mahabir and his other son (a blind boy who does not appear in this case otherwise than as a joint proprietor) against Bindeshari Prasad to recover money alleged to have been deposited with him.

Bindeshari institutes by way of reply to these acts of hostility, and I suppose malice, proceedings against Lekhraj under Ss. 408 and 477, I. P. C., in the month of September 1911; and about a couple of days later he institutes a further suit in the High Court of Calcutta claiming an account on the ground that Lekhraj and his son were defaulting agents and liable to account. This was the condition of things in the month of October 1911 and it was quite certain then that there was a vista of litigation opening up between these persons, Lekhraj and his sons on the one hand, and Bindeshari Prasad on the other. The friends of both jointly met and endeavoured to induce the parties amicably to come to terms and settle their differences. This the plaintiffs and defendant agreed to do, and as a result of their agreement, a document, agreement or chitti, as it is generally called, was drawn up bearing the date 18th October 1911.

That document, summarised shortly, is to this effect. In consideration of Binde-

shari Prasad withdrawing the civil action for account in the High Court and the two criminal charges against Lekhraj, that he, Lekhraj, in return would give up his 6½ annas interest in the village of Tandwa; he would also transfer to Bindeshari an orchard of some small extent, and a house which he owned in Calcutta, and that he would pay in money the sum of Rs. 5,200 and would discontinue all actions and proceedings which he had instituted against Bindeshari. The considerations for this agreement is shown clearly, and the main consideration, as it appears from the document, was the abandonment of the proceedings under Ss. 408 and 477, I. P. C. The offences charged under these sections were the falsification of accounts and criminal breach of trust, neither of these offences being of a compoundable character as defined in the Penal Code itself. Lekhraj, so far as I can trace from the document, never objected to any of the provisions contained in the agreement of 18th October 1911. It does appear that in one action, which he brought against Bindeshari, Bindeshari on 26th October 1911, relying upon this agreement or contract, applied to have the proceedings against him at the suit of Lekhraj stayed on the ground that the matter of the dispute between them was at an end, and that Lekhraj appeared and applied under R. 3, O. 23, to resist this application for the determination of that suit. This is the only act that has been suggested as a repudiation of the terms of the agreement of 18th October 1911 by Lekhraj, and in my opinion no such act in itself involved any repudiation of that agreement.

Matters remained at rest, the parties were at peace, practically no step was taken, nothing actively was done between 18th October 1911 and December 1911, but undoubtedly during that period of time there was a discussion going on as to whether, if Lekhraj paid the money which he had agreed to pay to Bindeshari Prasad, that would exonerate him and his sons from all liability to the cousins of Bindeshari, who had an interest in being reimbursed in respect of their share of any money that had been taken during the joint ownership of the two businesses prior to the partition which would cover the period between 1901 and 1906. That claim had been recognised and it was in order to provide a remedy for Lekhraj

that the matter was referred to arbitration. Each party selected his arbitrators, it was clear as to what they were to do and the award was clear as to what they did. They were asked to do no more than to ascertain what would be a fair share or proportion of the money paid to Bindeshari by Lekhraaj under the agreement of 18th October 1911, that he should pay to his cousins as representing the loss which they had sustained, while the joint business was being carried on. The arbitrators found that that sum ought to be measured at Rs. 2,000 and they accordingly so awarded, and in the award of 29th December 1911 they incorporated the antecedent agreement of 18th October 1911 and they varied none of its terms otherwise than I have stated. Then, in considering the award which was made between the parties one has to read the three documents together, viz. the document dated 18th October 1911, the reference dated 28th December 1911 and the final award of 29th December 1911.

Lekhraj acquiesced in that submission an award, he apparently having been advised throughout the negotiations leading thereto by his solicitors and by a pleader. Lekhraj took every benefit that was conferred upon him by the award. I can find no document throughout the case which would directly or indirectly suggest that he was induced to enter into that compromise by duress, undue influence or by fear. Finally on 7th January 1912, in part performance of the compromise, he executes a conveyance to Bindeshari Prasad assigning to him *eo nomine* three denominations of land which I have already mentioned but the important one being the $6\frac{1}{2}$ -annas interest in the village of Tandwa. That document is a very full and elaborate one. It was drawn up by a pleader at the express invitation, as I gather, of Lekhraj himself, and it contains step by step each incident of the litigation culminating in the arbitration and the award of 29th December 1911 and negatives by its terms the suggestion of undue influence or duress. By this conveyance of 7th January 1912 Lekhraj fully and freely assigns possession of this property to Bindeshari, and towards the end of the document a condition is inserted in the deed that the deed is not to come into force until all the proceedings have been withdrawn and that if the proceedings were not with-

drawn the property was then to revert to him, Lekhraj, in as full a manner as he had prior enjoyment thereof, and then pending the withdrawal of all proceedings, civil and criminal, he was to retain possession of the title-deeds, and he deposits the receipt of this indenture, which was duly registered, with his arbitrator Kokil and requests him not to deliver it to Bindeshari until all the conditions provided by the agreement had been satisfied. Kokil, to whom the deed of conveyance was given to be handed over to Bindeshari Prasad on the fulfilment of the two conditions necessary to be performed by him, is since dead, but he told the witness Lalji Ram that he had heard from Lekhraj that the High Court suit had been withdrawn and that the deed might, therefore, be handed over to Bindeshari Prasad. This was probably early in February. This evidence is not contradicted and thus it appears that Kokil, Lekhraj's arbitrator, handed over the deed of conveyance of 7th January 1912 to Bindeshari Prasad at the request of Lekhraj and this is how the deed comes now to be in possession of the defendant. Now this action seeks to have that deed set aside and asks us, in the exercise of our equitable jurisdiction, to cancel it.

The grounds put forward for asking us to exercise our jurisdiction are: (1) that Lekhraj was induced by facts amounting to fraud, undue influence and duress, practised and exercised upon him by Bindeshari, to execute that conveyance; (2) further, inasmuch as the contract between the parties was for an illegal consideration it was not binding on him and that, therefore, to avoid any doubt being cast upon his title the deed of the 7th January 1912 should be cancelled and declared a nullity. On the 30th January 1912 the criminal proceedings were entirely discontinued. (The record speaks for itself and shows that the cases against Lekhraj were withdrawn and he was acquitted of the charge, and the order made by the Magistrate was made with the consent of the parties themselves who apparently were present.) Steps were also taken to withdraw the High Court action for an account, the only remaining thing which Bindeshari had to do. Correspondence was entered into between the solicitors of both parties; four or five letters were written. On the 30th January 1912 and 2nd February 1912 the draft

forms of petition for withdrawal of the High Court proceedings were approved of by the solicitors on behalf of Lekhraj and Bindeshari, and there was no earthly reason why that petition should not have been filed and the proceedings dismissed and litigation terminated. But apparently nothing was done and suddenly the parties take it into their heads in the month of May to revive the question of this petition and then Lekhraj, acting through his solicitors, writes on 20th June 1912 that, having regard to the events that happened, he declined to give his consent to the withdrawal of the High Court action, the withdrawal of that action having been a condition named by him for the delivery of the deed and it being an essential term of the compromise arrived at between the parties.

What happened in the meantime? On 9th March 1912 Lekhraj embarks upon this action with his sons and I have indicated the relief he seeks. Bindeshari starts the alternative action for the enforcement of the award; but as Mr. Hasan Imam fairly admitted, there was very little substance in that claim. The main issue in this case lies in the action instituted by Lekhraj against Bindeshari in appeal No. 547 of 1913. Three issues appear to us to arise for determination:

(1) Was the purchase of this $6\frac{1}{2}$ annas interest in this village by Lekhraj made by him as a benamidar of Bindeshari? (2) Who provided the purchase-money for the payment of Rs. 12,000 as the purchase price of this interest? and (3) the most important of all, are Lekhraj and his co-plaintiffs now entitled to have this deed delivered up and under our order cancelled? In other words, has he come into Court and shown us clearly that having secured the benefit provided for him under the illegal contract we ought to cancel this deed in his favour. We have considered very carefully the first two issues which arise for consideration, namely, as to who is the owner and purchaser of the $6\frac{1}{2}$ annas interest and whose money paid for it?

The facts as regards both these issues are very conflicting and give us much cause for hesitation and doubt; but acting on the well-recognised principle that Judges, on appeal, even though they may have control on questions of fact, should be slow to reverse the finding of a Judge of first instance who has seen and heard the witnesses examined

before him and who by reason of this facts, is probably better able to come to a right conclusion, therefore, though we ourselves, had we been Judges in the first instance as to the facts, might have come to a different conclusion, we do not feel justified in disturbing the finding of the learned Subordinate Judge on the first two issues I have mentioned.

Now as to issue 3 in this case, we have no doubt what our decision should be. The three documents comprising the award in this case clearly show that the consideration on which the agreement was based was illegal, inasmuch as the consideration was that criminal offences, being of a non-compoundable character, should be compounded. The case cited as *Mujebar Rahman v. Muktashed Husain* (1), with which we entirely concur, establishes that any contract founded on such illegal consideration is wholly void. If any part of the consideration supporting a contract is void, it taints the whole contract with illegality; and even though a part of the consideration may be legal, yet, if you cannot sever the legal from the illegal, the taint of illegality vitiates the entire contract. In our opinion the contract in this case was founded upon an illegal consideration, being the withdrawal of criminal charges which could not be compounded; and we reject as untenable the argument of Mr. Hasan Imam founded on S. 370, Criminal P. C., for the purpose of showing that consideration supporting this contract was legal and not illegal.* We have been referred by Mr. Sahai to a case reported as *Srirangachariar v. Ramasami Ayyangar* (2) resembling in many respects the facts of this case, but we do not think the principle enunciated in that case is sound, or that it should be followed. The rule of law with regard to illegal contracts is that a Court of law will not aid persons in enforcing the performance of an illegal contract or assist them to recover back property which they have given away under such an illegal contract, when the persons and parties to the contract are themselves *pari delicto* in procuring this illegality. The Courts

1. (1913) 40 Cal 113=15 I O 259.

2. (1895) 18 Mad 189.

* Mr. Hasan Imam's contention was that as the order of the Presidency Magistrate permitting withdrawal of the prosecution did not show the case to be a non-compoundable one, the consideration for the contract was not illegal.—Ed.

of Equity in England have always refused to afford equitable relief in enforcing a contract void in law or restoring property which is based on an illegal contract where the illegality is apparent on the face of the document itself. *Simpson v. Lord Howden* (3) illustrates this principle. Mr. Sahai contends, however, that Lekhraj is really not in *pari delicto* with Bindeshari Prasad in procuring the contract in this case, because he says that Lekhraj was induced to enter into the contract with Bindeshari Prasad through duress and undue influence and fear. In answer to that argument we can only say that we cannot find a trace nor a scintilla of evidence to justify the assertion that, in doing what Lekhraj did, he acted under any undue influence, compulsion, duress or fear alleged to have been practised upon him by Bindeshari Prasad. To our mind undue influence is conspicuous by its absence. The onus is upon Lekhraj to establish undue influence as a fact and this he has not done. Therefore Lekhraj, in our opinion, was in *pari delicto* with Bindeshari Prasad in procuring the illegal contract in this case. Mr. Sahai's second argument is that, if the contract out of which this deed springs be void, the deed itself is void, and, therefore, he invokes our aid to have it cancelled. We think that there can be no distinction in principle between granting relief by way of a declaration and that by which Courts of law and equity have refused to restore property given away under an illegal contract or to enforce the obligations created under an illegal agreement. Therefore if there were nothing further in the case, we think that according to the principles of English equity the Court should refuse to grant the relief by way of declaration sought in this case, leaving it to both parties to suffer the outcome of their joint wrong, and that neither ought to be assisted against the other under equitable jurisdiction of this Court. However, it has been pointed out to us that under S. 39, Specific Relief Act, according to Indian law, relief can, in a proper and fit case, be given effect to, even when a contract out of which the right springs is void. But the section leaves it entirely to the discretion of the Court to exercise the jurisdiction so conferred upon it. We see nothing in this case which should or ought to induce us to grant the relief

claimed in this action under S. 39. The case cited as *Thasi Muthukannu v. Shunmugavelu Pillai* (4) has no application to the present case before us, inasmuch as the basis of the decision in that case was the fact that undue influence had been practised upon the donor of the gift in that case, and that consequently he was not a free agent or in *pari delicto* with the other party to the gift. For these reasons we think that the judgment of the learned Subordinate Judge in this case must be reversed and that the decree in the action No. 547 of 1913 should be dismissed with costs in all Courts. And for like reasons we think that the claim made in the suit No. 438 of 1913 should likewise be dismissed with costs.

Chapman, J.—I agree that the suits should both be dismissed with costs. Where the illegal portion of an agreement has been carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other. The Courts will not assist an illegal "transaction" [*Taylor v. Chester* (5)]. It is a scandal to assist a plaintiff to recover upon the ground that he has joined in breaking the law, but this will not prevent the Court from intervening to frustrate the illegal purpose before it has been effected, or, in any event, from giving relief to the innocent. In particular, the Court will not in any case allow a defendant to retain the proceeds of fraud or oppression: and the Court will not refuse protection to those classes of persons whom the law seeks to protect. But in a case in which no such considerations arise, if the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate: *Kearley v. Thomson* (6).

In the present case the illegal portion of the agreement was the undertaking to withdraw from the prosecution of certain charges which the law says, "shall not be compounded." This illegal promise had been carried into effect beyond possibility of recall. One side now seeks relief from the act done in consideration

4. (1905) 28 Mad. 413.

5. (1877) 4 Q B 309.

6. (1890) 24 Q B D 742.

for the illegal promise. All that they can say in excuse of their breach of the law is that they were persons accused in those criminal cases. But *executio juris nun habet injuriam* and in the absence of any evidence to suggest that the criminal proceedings were improper, it cannot be held that there was any fraud or oppression or that the accused took a more innocent part in the illegal compromise than the complainant. The authorities make it clear that a suit for the recovery of property transferred in consideration for such an illegal promise would not have lain. There is no direct authority that the principle would also defeat a suit which is not for the recovery of property but merely for a declaration that a sale deed executed in consideration for the illegal promise is void, and in America it has apparently been held that a declaratory suit would not be defeated: Keener on Quasi Contracts, p. 441. But if it is the scandal involved that defeats suits of this class, then the principle is clearly applicable to a suit for a declaratory decree. For so far as the scandal is concerned there is no difference between a suit for the recovery of property and a suit for declaration.

It is contended that the refusal of a declaration that the deed was void, will operate as a direct encouragement to the improper compounding of offences inasmuch as the complainant-defendant will be permitted to retain the proceeds of the illegal compromise. Some authority for the general application of this consideration can be found in the judgment of De Grey, C. J., in *Jaques v. Glightly* (7), a case of the 18th century. But ever since then the counter-consideration has prevailed, except in certain classes of cases which I have endeavoured above to define.

V.S./R.K. Appeals dismissed.

7. 2 Black W 1073=96 E R 632.

A. I. R. 1916 Patna 290

ATKINSON AND JWALA PRASAD, JJ.

Sarjoo Prasad Missir and others—Decree-holders and Petitioners—Appellants.

v.

Nanoo Rai and others—Judgment-debtors and Opposite Parties—Respondents.

Misc. Civil Appeal No. 446 of 1915, Decided on 3rd July 1916.

(a) Bengal Tenancy Act (8 of 1885), S. 174—Application to set aside sale—When can be entertained.

A Court has no jurisdiction to entertain an application to set aside a sale under S. 174, Ben. Ten. Act, until it is satisfied that the statutory conditions provided by the section have been fulfilled. 18 Cal 255 and 25 Cal 216, *not foll.*

[P 291 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 174—Order under S. 174 without jurisdiction—High Court has power to set aside

The High Court has jurisdiction to set aside an order made under S. 174 without jurisdiction.

[P 292 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 174—Officers of Court not bound to give information to parties.

No duty is cast upon the officers of a Court to give any information to the parties for the purposes of S. 174.

[P 291 C 2]

(d) Bengal Tenancy Act (8 of 1885), S. 174—Wrong information supplied by officer of Court—No relief can be granted—"Act of Court"—Explained.

No relief can be given to a party who has been misled by wrong information supplied by an officer of a Court. Relief can only be granted in cases where a party has been misled by an "act of the Court," that is, an act of a prescribed officer acting in accordance with the prescribed rules of the Court: 26 Cal 449 (F B), *Rel on.*

[P 292 C 1]

(e) Bengal Tenancy Act (8 of 1885), S. 174—Deposit of decretal amount with 5 per cent. purchase money must be made within 30 days.

A deposit of the decretal amount together with the statutory 5 per cent. on the purchase-money under S. 174, in order to be valid and to give the Court jurisdiction must be made within 30 days of the sale, and not later.

[P 292 C 2]

Harnarain Pershad, Mohammad Mustafa Khan and Baidya Nath Sinha—for Appellants.

Chandra Sekhar Prasad Singh—for Respondents.

Atkinson, J.—This application comes before us on an application by the decree-holder and auction-purchasers to set aside the order of the District Judge of 10th August 1915 and the order of the Munsif dated 8th March 1915, on the ground that there was no jurisdiction to entertain the application of review, inasmuch as the order setting aside the sale in this matter, dated 21st March 1914, was illegal and invalid. The facts are shortly as follows: The plaintiff obtained a decree against the defendant on 2nd September 1912 for Rs. 18-4-9. In pursuance of that decree and in execution of it, the property was put up for sale on 17th February 1914; and the defendant had, under S. 174, Ben. Ten. Act, 30 days from 17th February 1914 to lodge in Court the amount recovered under the decree with costs, plus 5 per cent. upon the purchase-money

to save the property from being sold. The property was sold for Rs. 115. On 10th March 1914, the defendant applied to an officer of the Munsif's Court, by a petition dated 10th March 1914 asking to be informed what was the decretal amount, the whole decretal sum, which it was necessary he should deposit under the section. The Munsif's officer told him that the amount of the decree was so much, that poundage-fees were so much and that interest amounted to so much, making a gross sum of Rs. 21-7-9. Thereupon the defendant lodged or deposited in Court the amount so stated to him by the officer of the Munsif's Court, but ignoring altogether in the deposit which he made the 5 per cent. upon the purchase-money which would have increased the amount that was deposited by Rupees 5-12-0.

Thus on 10th March, when the amount of the decree and costs was ascertained by the defendant, he lodged or deposited in Court on 21st March 1914 the amount so ascertained as aforesaid less the shortage of Rs. 5-12-0. On the same day, 21st March, notwithstanding the shortage in the deposit, the defendant applied to the Munsif to set aside the sale that had been made under the provisions of S. 174, Ben. Ten. Act. The Munsif on 21st March 1914, although the full amount of money that should have been deposited was not lodged, made an order setting aside the sale against the purchaser. That order, so made, was absolutely without jurisdiction. The Munsif was lacking in the due discharge of his duty in entertaining any application to set aside the sale, until he had satisfied himself that the statutory conditions provided by S. 174 had been fulfilled; and clearly they were not fulfilled. An order was made by the Munsif on the application of the purchaser on 8th March 1915, declining to review the order which the Munsif had made upon 21st March 1914; and even on this date the defendant had not lodged the shortage due on foot of the full amount of his due deposit. With this fact before him, the Munsif declined to review his order setting aside the sale; although, even at that moment of time, he had not acquired jurisdiction. As far as I can ascertain looking at the record the shortage of Rs. 5-12-0 was not lodged until after the order of review had been refused by the Munsif, viz. 11th March 1915.

From that order of refusal to review the purchaser appealed. The learned District Judge on 10th August 1915 refused by his order to entertain the appeal on the ground that he had no jurisdiction in the matter, as no right of appeal lay from an order refusing to review. This case, in its facts, is unlike any other case recorded in the Reports. But speaking for myself, I am of opinion that cases reported as *Ugrah Lall v. Radha Pershad Singh* (1) and *Abdool Latif Moonshi v. Jadub Chandra Mitter* (2) are no longer to be regarded as authorities on the question of lodgments of deposits to be made under S. 174, Ben. Ten. Act. I think the decisions in both these cases are materially inconsistent with the Full Bench decision reported as *Chundi Charan Mandal v. Banke Bhary Lal Mandal* (3). No doubt, the decision in *Chundi Charan Mandal v. Banke Behary Lal Mandal* (3) was a decision on S. 310-A of the old Code corresponding with O. 21, R. 89, of the existing Code, as to the right of a defendant, a judgment-debtor, to make lodgments in Court with a view to setting aside a sale effected in execution of a decree.

But when we compare the two sections, S. 174, Ben. Ten. Act and O. 21, R. 89 of the new Code, it requires a very subtle mind to distinguish any essential difference between the obligation imposed by both these sections. To my mind it is merely trifling with words to suggest, as has been suggested, that there is any material difference between the two sections. Therefore, in construing and applying the law to S. 174, Ben. Ten. Act we shall be guided by the principles laid down in the Full Bench case reported as *Chundi Charan Mandal v. Banke Behari Lal Mandal* (3). It is said in this case that forsooth the defendant was misled by some mistake on the part of an officer of the Munsif's Court. I fail to follow that line of reasoning. There was no duty cast upon the officer of the Munsif's Court to give any information to the defendant, for any purpose which he might require under S. 174. The law throws the obligation upon the defendant himself, to ascertain for himself, by whatever means he likes, the amount he has to pay into Court. But it casts no responsibility, no duty whatsoever, upon the officer of the

1. (1891) 18 Cal 255.

2. (1898) 25 Cal 216.

3. (1899) 26 Cal 449.

Court to furnish information or give information. If an officer of the Court does yield to any application that may be made to him by a judgment-debtor; then he gives that information, not by virtue of his acting as an officer of the Court, but solely by virtue of his friendship, if you like, or regard, or as agent of the individual to whom he gives the information.

It seems to me that the observations of Jenkins, C. J. (or Jenkins, J., as he then was) at p. 459 (of 26 Cal) of *Chundi Charan Mandal v. Banke Behari Lal Mandal* (3) aptly fit the facts and circumstances of this case.

The learned Judge there says:

"In my opinion, it is essential to the respondents' success, that it should be established that he has been prejudiced by the act of the Court, and that the mistake that has been made is attributable to that act. What constitutes an act of the Court must depend on the circumstances of each case. It is clear, I think, that a mere causal act by an officer of the Court cannot be treated as the Court's act. For an act to be clothed with that character, it appears to me, generally speaking, that it must be the act of the prescribed officer acting in accordance with the prescribed rules of the Court."

In my opinion, to hold otherwise would be a dangerous innovation, and a most dangerous practice to establish, offering the gravest insecurity to decree-holders and auction purchasers. Therefore, in my opinion, this defendant was in no way misled by the Munsif's officer. He got from the Munsif's Court the only information he asked for, and having got it he failed to discharge the balance of his statutory duty, by despositing in addition 5 per cent. calculated upon the amount of the purchase money. That was his own default and the default of no one else, and for that default he must be responsible. I am satisfied, beyond all shadow of a doubt that we have jurisdiction in this case to review the decision of the Munsif. His order setting aside the sale was absolutely without jurisdiction. We are asked to set aside the order of 8th March 1915 refusing to review. We have little doubt that we should do so; and we do so for the obvious reason that the order of 21st March 1914, on which it was based, was made without jurisdiction. Mr. Singh very ably argued this case for the respondents, pressing us strongly, so far as human nature is concerned, to view the facts in the too generous light put forward by him on behalf of the defendant. But there was one argument of his I want to

answer, and that is that it does not matter when the money is lodged under S. 174, if, in point of fact, it is all lodged at the time the application comes before the Munsif even though that time may be 40 or 50 days after the sale.

In my opinion that view is wrong. The money, to be a valid deposit and to give the Court jurisdiction, must be lodged within 30 days from the sale and not later. I can conceive, in some cases, where possibly a mistake might have been or may be made, where an individual judgment-debtor may be misled by an officer of the Court as such. In such a case the Court always has power in the exercise of its jurisdiction to redress a wrong. But this case is not one of such a character. Therefore, without hesitation and without a shadow of doubt, hoping this practice will end, which is alleged to exist and which is a bad practice, we allow this appeal and set aside the order dated 8th March 1915 of the Munsif, and also the order of 21st March 1914 setting aside the sale. Having regard to the delay and the way in which this case has been presented both on documents and otherwise, we will give no costs.

V.S./R.K.

Appeal accepted.

A. I. R. 1916 Patna 292

Full Bench

CHAMIER, C. J., SHARFUDDIN AND ROE, JJ.

Parmessar Singh—Applicant.

v.

Kailaspati and others—Opponents.

Criminal Revn. No. 180 of 1916, Decided on 7th August 1916, to revise order of Sub-Divl. Magistrate, Barh.

(a) Criminal P.C. (5 of 1898), S. 435—High Court—Power to send for record of proceedings under Ch. 12, Criminal P. C.—Statutory power of superintendence.

High Courts in India which have no statutory power of superintendence cannot under S. 435, Criminal P. C., send for the record of proceedings which are in substance and in facts proceedings under Ch. 12 of the Code and were conducted by a Magistrate who had jurisdiction. [P 294 C 2]

(b) Criminal P. C. (5 of 1898), S. 435—Magistrate acting without jurisdiction under S. 145, Criminal P. C.—Chartered High Court—Powers of superintendence—Government of India Act 1915 (5 and 6, Geo. 5, c. 61) S. 107.

A Chartered High Court has power under S. 107, Government of India Act, to interfere with an order passed by a Magistrate under S. 145, Criminal P. C., where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction. It will not interfere merely because

there has been an irregularity in the proceeding or an erroneous decision on a question of fact or law, but it can and will interfere where has been a material irregularity, which amounts to a refusal to exercise or an usurpation of jurisdiction or which has prejudiced a party to the proceedings. In order to establish prejudice it is not sufficient to show that there has been an erroneous decision on a question of law or fact, but it must be shown that the irregularity has prevented a party from having a fair trial: 30 Cal 155 (F B), Appr; 7 Bom 341 (F B), Ref. [P 294 C 1]

Per *Roe, J.*—The power of superintendence in S. 107, Government of India Act, is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction or in excess of jurisdiction or has refused to exercise a jurisdiction vested in it by law. (The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity has been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial, however erroneous in law or fact that decision may appear to be: *Case-law discussed.* [P 298 C 2])

(c) Criminal P. C. (5 of 1898), S. 145—Proceedings under S. 145—Subsequent Civil or Criminal Court's decision—Effect.

No hard and fast rule can be laid down that a Magistrate in proceedings under S. 145 of the Code must give effect to a recent decision or proceeding of a civil or Criminal Court: 33 Cal 33 (F. B.) Ref. [P 294 C 2]

(d) Criminal P. C. (5 of 1898), Ss. 145 and 435—Order under S. 145—Revision—Powers of—High Court can interfere under S. 107—Government of India Act, 1915

Per *Sharfuddin, J.*—The High Court cannot under the Criminal Procedure Code interfere with any order passed by a Subordinate Magistrate in a proceedings under S. 145 of the Code, but it can interfere under S. 107, Government of India Act, 1915. [P 295 C 1]

(e) Criminal P. C. (5 of 1898), S. 145—Decree of Civil Court must be respected—Reasons against must be given.

In a proceeding under S. 145 of the Code, a Magistrate is bound to respect a Civil Court decree; if he does not do so, he acts without jurisdiction. But he is not blindly to follow the decree. If after the passing of the decree the Magistrate finds on evidence that a party's possession has been disturbed or that possession has changed hands, he has jurisdiction to pass order under the section. [P 293 C 2]

But in all such cases the Magistrate is bound to refer to the Civil Court decree and give reasons in his judgment why he passes an order against the party who has obtained that decree. [P 296 C 1]

Krishna Sahay and Kulwant Sahay—for Applicants.

P. K. Sen, Atul Krishna Ray & Abani Bhushan Mukherji—for Opponents.

Chamier, C. J.—This is an application under S. 107, Government of India Act, 1915, for revision of an order of the Sub-divisional Magistrate of Barh in proceedings taken under S. 145, Criminal P. C., deciding that the respondents are in possession of 29 bighas of land, declaring that they are entitled to possession of the same until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction.

The applicants' case was and is that they purchased the land in execution of a decree obtained against one Kailaspati, and that it was his khud-kasht land, that by their purchase they acquired a right to khas possession of the land, and that in fact they were placed in possession by the Civil Court in June 1915. The respondents' case was and is that the land was not the khud-kasht of Kailaspati but was raiyati land, that they were and are in possession of it as raiyats, that the applicants did not by their purchase acquire a right to khas possession, and that the applicants were not in fact placed in khas possession by the Civil Court. Three points are urged on behalf of the applicants, namely, that the Magistrate was bound to respect and maintain the possession delivered by the Civil Court, that the respondents claimed only 21 bighas of the land and therefore the Magistrate was wrong in declaring them to be entitled to 29 bighas, and that there was no evidence to support the finding that the land was raiyati land. A Special Bench was constituted to hear this application because it was said that great uncertainty prevailed as to the grounds on which this Court could interfere in cases of this kind, and it was felt that the practice of the Court should be settled. Under S. 107, Government of India Act, 1915:

"Each of the High Courts has superintendence over all the Courts for the time being subject to its appellate jurisdiction."

These words take the place of similar words in S. 15, High Courts Act, 1861. The word "superintendence" in common parlance means supervision or care and oversight for the purpose of direction. In one case it was said that this provision authorised the High Courts to interfere for the purpose of remedying any wrong suffered by a party to a proceeding in a Court by reason of an erroneous finding of fact or law. If this provision bears this interpretation, the High Courts are

by it invested with all the powers of an appellate Court as well as with all the powers of a Court of Revision. A superintending jurisdiction has been exercised from ancient times by the King's Bench and Court of Chancery and it may, I think, be safely assumed that the Legislature when passing the Indian High Courts Act, 1861, did not intend to confer on the Indian High Courts a wider superintending jurisdiction than that enjoyed by the King's Bench or Court of Chancery. I have examined a large number of reported cases, in addition to those cited during the arguments, and I have had the advantage of reading the judgments which my learned colleagues have prepared. Here and there a discordant note may have been struck, but I consider that the decisions of the Chartered High Courts, and particularly those of the Calcutta High Court, taken as a whole, lay down the rule that a High Court can and will interfere in a case of the kind now before us where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction, that it will not interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law, but that it can and will interfere when there has been a material irregularity which amounts to a refusal to exercise or an usurpation of jurisdiction or which has prejudiced a party to the proceedings. In order to establish prejudice, it is not sufficient to show that there has been an erroneous decision on a question of law or fact but it must be shown that the irregularity has prevented a party from having a fair trial.

The object of the law is to prevent a breach of the peace by determining the actual possession of land etc., in dispute between certain parties who are likely on this account to break the peace: See *Krishna Kamini v. Abdul Jubbar* (1). S. 145, Criminal P. C., shows that the Legislature intended that the party dissatisfied with the order of the Magistrate should obtain a final decision of the question in dispute elsewhere. The High Court therefore as West, J., said in *Shiva Nathaji v. Joma Kashinath* (2), will not promote uncertainty and restlessness by an overnice scrutiny of proceedings that aim at promptness rather than refine-

ment. The policy of the Indian Legislature in this matter is shown by the provision in S. 435, Criminal P. C. 1898, which prevents the High Court as Courts of Revision under Ch. 32, of the Code from sending for the record of proceedings under Ch. 12. The result is that High Courts in India which have no statutory power of superintendence cannot send for the record of proceedings which were in substance and in fact proceedings under Ch. 12 of the Code and were conducted by a Magistrate who had jurisdiction.

In the application of the rule, which the High Courts have laid down for themselves in matters of this kind, there have no doubt been differences of opinion. For instance at one time it was said that a High Court could examine the information that there was a likelihood of a breach of the peace, on which the Magistrate initiated the proceedings, with a view to testing its reliability or sufficiency, but it is now well settled that the sufficiency of the information is entirely a matter for the Magistrate and that the High Court will not require it to be furnished to him in any particular form. There is a reported case in which the refusal of a Magistrate to examine a host of witnesses on each side seems to have been treated as equivalent to a refusal to examine any witnesses at all. The better opinion seems to be that a refusal of the latter kind might be overruled by the High Court as a grave irregularity resulting in obvious prejudice to the parties, but that it is within the Magistrate's discretion to refuse to allow parties to produce a host of unnecessary witnesses. Judges have at times attempted to lay down a hard and fast rule to the effect that a Magistrate in proceedings under S. 145, Criminal P. C., must give effect to a recent decision or proceeding of a Civil or Criminal Court. It appears, however, that no such rule can be laid down: see the remarks on this subject made by Rampini and Mookerji, JJ., in *Kulada Kinkar Roy v. Danesh Mir* (3). Difficulties have also arisen regarding the powers of the Magistrate to add parties, the necessity for initiating fresh proceedings when this is done, and the power of the Magistrate to decide a question of possession between disputing parties, when other persons

1. (1903) 20 Cal 155 (F B).

2. (1888) 7 Bom 344 (F B).

3. (1906) 33 Cal 33 (F B).

not parties to the proceedings or concerned in the dispute are interested in part of the land. The Full Bench decision in *Krishna Kamini v. Abdul Jubbar* (1) has set at rest several of these questions.

In the great majority of cases, however, the Courts have felt little difficulty in applying the rule set out above and that is the rule which, in my opinion, this Court should follow. To come to the facts of the case now before us, the Magistrate has distinctly found that khas possession did not pass to the applicants under the proceedings of the civil Court relied upon by them. We must accept this finding as correct. The second contention is not borne out by the record and as regards the third it is sufficient to say that there is evidence which has been believed by the Magistrate that the land was raiyati land. It is not suggested that the Magistrate exceeded his jurisdiction or that his proceedings were irregular. In my opinion the applicants have failed to establish any ground on which this Court should interfere in exercise of its power of superintendence. I would dismiss this application.

Sharfuddin, J.—This Special Bench has been formed for the purpose of deciding whether the High Court has jurisdiction to interfere with an order passed under S. 145, Criminal P. C., by a competent Magistrate. S. 435 of the Code vests in the High Court certain powers of supervision. It may call for and examine the record of any proceeding before any Criminal Court for the purposes of satisfying itself as to the correctness, legality and propriety of any finding, sentence or order and as to the regularity of any proceedings of inferior Courts. There is no doubt that the provisions of this section give extensive powers to the High Court, but under Cl. (3) of that section it is provided that proceedings under Ch. 12 are not proceedings within the meaning of that section. It is clear that the High Court cannot under the Code interfere with any order passed by a Subordinate Magistrate in a proceeding under S. 145, Criminal P. C.

But under S. 107, Government of India Act of 1915, a general power of superintendence over the Subordinate Courts has been given to the High Court which is somewhat analogous to the power of the King's Bench Division in the Supreme

Court in England to interfere by mandamus. The literal meaning of the expression to "superintend" is to have oversight of. The meaning given in the dictionary is to oversee with powers of direction. On a review of the case-law on the subject I have no doubt that in the exercise of its power of superintendence a Chartered High Court is justified in interfering with an order under S. 145, Criminal P. C., if the order complained of has been passed without jurisdiction, and the High Court may also interfere in cases of grave and material irregularity where the party has been prejudiced or there has been a failure of justice. For instance if a Magistrate refuses to examine the witnesses cited by the parties, he acts without jurisdiction and in such a case this Court ought to interfere.

In the present case the grievance is that there was a Civil Court order in favour of the applicants which the lower Court has refused to respect and has passed an order directly in conflict with it. An order passed under S. 145, is in its nature a summary order and it is a preventive measure. The Magistrate gets jurisdiction if there is an apprehension of a breach of the peace with regard to "any land or water," and the party found to be in possession may be declared entitled to remain in possession until evicted therefrom by a competent Court. A Civil Court decree in favour of a party will become infructuous if the Magistrate interferes with it, but the Magistrate is not bound to maintain it blindly. If after the passing of the decree the Magistrate finds on evidence that the party's possession has been disturbed or that the possession has changed hands he has jurisdiction, but this will be a matter of fact which the Magistrate has to decide. If he comes to a finding, which would be a finding of fact, that such possession has been disturbed since the decree was passed, he has jurisdiction in a proceeding under S. 145 to pass orders irrespective of the Civil Court decree. In the case of a Civil Court decree of very recent date where there is no evidence to show disturbance or change of possession since the decree, the Magistrate is bound to respect the Civil Court decree and if he does not do so he acts without jurisdiction.

In the present case Parmessar Singh purchased at an auction in execution of a

Civil Court decree the property of one Kailashpati Sahai in a mauzah. This was on the 23rd January 1915 and on 3rd June he obtained delivery of possession through Court. His case was that what he purchased was an area of 58 bighas, that the whole area was khud-kasht of the outgoing malik and that he was entitled to retain possession of the entire area; on the other hand the other party, consisting of some tenants, contended that out of the entire area, 29 bighas were raiyati land and that they were raiyats of those lands and were in possession. It was on the initiation of the purchaser that proceedings under S. 145 were instituted by the Magistrate. The Magistrate after the perusal of written statements of both sides, recording evidence and hearing arguments, passed an order against the applicant. The applicant now contends that we ought to interfere with that order on the ground that the Magistrate had failed to respect the delivery of possession by the Civil Court. As already observed, it is the duty of a Magistrate to consider whether in the circumstances of a particular case and on the evidence before him he should or should not maintain the order of a Civil Court. I am of opinion that on that ground only we cannot interfere, but at the same time I am of opinion that in all such cases a Magistrate is bound to refer to the Civil Court decree and give reasons in his judgment why he passes an order against the party who has obtained that decree. There are other circumstances as well in which the Court ought to interfere. It is impossible to give an exhaustive list, but I may refer to some of them. For example, (1) if a Magistrate passes an order not on the evidence recorded but only on a perusal of the written statements, or (2) if he refuses to summon witness or where he had already issued summonses he refuses without reason to issue fresh summonses on the non-appearance of the witnesses, or (3) if he acts on his own information, this Court could interfere. In the present case nothing has been done by the Magistrate which can be called without jurisdiction. I am, therefore, of opinion that the application should be rejected.

Roe, J.—On the 23rd January 1915, Parmessar Singh purchased at auction-sale in execution of a Civil Court decree the

16-annas proprietary interest of Kailaspati Sahai in Mauzah Aima. On the 3rd June, he obtained delivery of possession. He contends that included in the proprietary interest was the khud-kasht right to cultivate the whole of the land, 58 bighas, in which possession was delivered to him by the Civil Court. He was obstructed in an attempt to enter into cultivating possession of 29 bighas out of these 58 bighas and instead of going to the Civil Court under O. 21, Rr. 97 and 98, he asked the Criminal Court to issue an order under S. 144, Criminal P. C. The Magistrate after hearing the parties drew up proceedings under S. 145, and after taking evidence declared that certain tenants, whom Parmessar Singh alleged were mere dummies of Kailaspati Sahai, were in possession of the 29 bighas in dispute. Parmessar Singh now asks this Court to revise these proceedings, on the ground that the Civil Court having delivered possession to him of the property in dispute and a Revenue Court having made a decision in his favour, the Criminal Court should not have declared the opposite party to be in possession. Before considering the case on its merits I propose to consider what jurisdiction this Court has over proceedings under S. 145. It is conceded at the Bar that we can only interfere under S. 107, Government of India Act, in the exercise of our powers of superintendence.

In *Lekhrajram v. Debi Pershad* (4) Woodroffe, J., states that there is no form of judicial injustice which the Court, if need be, cannot reach under this power but in the commentaries of Messrs. Woodroffe and Ameer Ali on the Code of Civil Procedure, S. 115, it is conceded that certain limitations have been laid down which will ordinarily govern the Courts. That in the exercise of its powers of superintendence a Chartered High Court may interfere, if the order complained of is one passed without jurisdiction, is certain: *Nilmoni Singh Deo v. Taranath Mukerjee* (5). It is necessary only to enquire within what limitations this power has ordinarily been exercised by the four Chartered High Courts of India. When these Courts were established they had under S. 35 of Act 23 of 1861, no power of revision over Courts of first instance. In the early volumes of Sutherland's

4. (1908) 12 C W N 678.

5. (1883) 9 Cal 295=9 I A 174 (P.O.)

Weekly Reporter there is no suggestion that the Fort William Court felt the need of such powers, until on the 13th February 1866, the case of *DaCosta J. v. M. M. Hall* (6) came before a Full Bench composed of Peacock, C. J., and Bayley, Seton-Karr, Sambhu Nath Pandit and A. G. Macpherson, JJ. The issue was in a sale in execution, in which a Court of first instance has made an order outside its jurisdiction, can the High Court set that order aside? The decision was: "We have gone carefully through the Charter and there is nothing in it which induces the Court to think that it has any power to give relief to the parties."

In *Subjaun Ostagar v. Promothonath Ghose* (7), on the 31st August 1866, Jackson, J., declined to exercise judicially a power of superintendence. Before Norman and Seton-Karr, JJ., on the 25th January 1867, came a case in which a Sadar Amin had insisted upon adding unnecessary parties to the record and on refusal by the plaintiff to add those parties had dismissed his suit. Both Judges were of opinion that the action of the Sadar Amin was not justified by law. They disagreed upon the question whether they had power to interfere. Seton Kerr, J., having refused to sign the order made by Norman, J., that order was an order by a single Judge. Under Letters Patent it came before Peacock, C. J., and Jackson and Macpherson JJ. On 25th February 1868 these three Judges agreed [*Judooputtee Chatterjee v. Chunder Kant Bhattacharjee* (8)], that under S. 15, High Courts Act, they had power to interfere. Peacock, C. J., and Macpherson, J., were parties to the decision in *Da Costa J. v. M. M. Hall* (6). Jackson, J., had denied his power to interfere in *Subjann Ostagar v. Promothonath Ghose* (7).

Sir Barnes Peacock gives no explanation of his change of front save that it had been suggested by one of his learned brothers whether if the Sadar Amin had made an order that the suit should not be heard for 20 years, such an order would be binding. Macpherson, J., merely concurred with the Chief Justice. Sir Louis Jackson wrote a separate judgment. He too gave no reasons for his altered view. Their reasons are, I think, to be found in *Gopal Singh v. Court of*

Wards on behalf of the Maharajah of Darbhanga (9). All that could be said on the subject had been said there by Norman, J., on 2nd May 1867, and had been followed on 7th June 1867 by Jackson, J., [*Greesh Chunder Lahoree v. Kasheessuree Debia* (10)] and on 9th June [*In the petition of Moonshee Oodiut Zuman* (11)] Jackson, J., had doubted the correctness of the Full Bench decision in *DaCosta J. v. M. M. Hall* (6). For the reason possibly that the two Judges sitting with Norman, J., refused in that case to exercise the power of superintendence over a Revenue Court, this judgment of Norman, J., has never been referred to in subsequent decisions. Nonetheless, it had, I believe, most important results and is itself of such interest that this extract at least is worthy of reproduction. Norman, J.,

"The term 'superintendence' is one not only quite intelligible in itself, but it has a legal force and signification which are perfectly well-known to the legislature. In 3 Blackstone's Commentaries, p. 110, is pointed out that it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those Judicial and ministerial powers with which the Crown or legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.

"In Bacon's Abridgment, title Prohibition, it is said: As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown and the administration of justice is committed to a great variety of Courts, hence it has been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed to them by laws and Statutes of the Realm. The superior Courts at Westminster, having a superintendence over all inferior Courts, may, in all cases of innovation, award a prohibition. In this the power of the Court of King's Bench has never been doubted, being the superior Common law Court of the Kingdom."

"This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior Court, after hearing the parties, comes to an erroneous decision, either in law or fact, on a matter within its jurisdiction, the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal."

This strict definition was emphasised by Sir Louis Jackson, on 25th March 1868 in *Nuffur Chunder Paul v. Nailuroonissa Beebee* (12), and on 28th April 1869 in *Kasheenath Roy Chowdhry v. Shabitree*

6. (1866) 5 W R Misc App 25.

7. (1866) 6 W R Misc Rul 77.

8. (1868) 9 W R 309.

9. (1867) 7 W R 430.

10. (1867) 8 W R 26.

11. (1867) 8 W R 109.

12. (1868) 9 W R 387.

Soonduree Dossee (13) Jackson, J., and Markby, J., approved these limitations. Thenceforth and for many years the Fort William Court observed strictly the limitations set by Norman, J., to its power of superintendence. In *Tej Ram v. Harsukh* (14) it will be seen that the Allahabad Court set itself to follow strictly the rules of superintendence laid down by Norman and Jackson, JJ. The leading case on superintendence in Bombay is that of *Shiva Nathaji v. Jama Kashinath* (2). This is a Full Bench case in which Raymond West, J., laid down seven broad principles upon which the High Court would interfere under S. 622 of the old Civil P. C. read with S. 15, Charter Act. The following passage in the judgment indicates that West, J., regarded superintendence from much the same point of view as Norman, J.,

"In such a conflict of opinion as has arisen on the subject we are now considering, it may be useful to see how similar questions have been dealt with by the Courts in England. Their decisions can of course only afford analogies, not precedents for Courts so differently constituted as those in India: but these analogies point to principles of general application and thus repay our attentive consideration. A superintending and visitatorial jurisdiction has been exercised from ancient times by the Queen's Bench and by the Court of Chancery. The powers of the former Court have been executed through the writs of mandamus and prohibition."

I have not been able to find any case in which the Madras Court in its early days had recourse to the Charter Act. That Court was content with S. 622 of the Code of 1877: *Manisha Eradi v. Siyali Koya* (15). *Kristamma Naidu v. Chapa Naidu* (16) and the invariable practice was to interfere only when there had been an error in jurisdiction. We have, therefore, in all the earlier decisions a *cursum curiae* throughout the Chartered Courts. The High Court would interfere when the Subordinate Court had acted without jurisdiction or when having jurisdiction, the Subordinate Court had refused to exercise it or made any colourable pretence of exercising it. That modern decision in Calcutta is in accordance with the early view is clear from *Hurbullubh Narain Singh v. Luchmeswar Prosad Singh* (17), *Raj Chunder Sen v. Ganga*

Das Seal (18), *Kulada Kinkar Roy v. Danesh Mir* (3), *Sukh Lal Sheikh v. Tara Chand Ta* (19), *Malik Protap Singh v. Khan Mahomed* (20) and *Sardari Sha v. Hakum Chand* (21). Of these I would quote only a few lines from Maclean, C. J.'s judgment in the Full Bench case of *Sukh Lal Shaikh v. Tara Chand Ta* (19):

"Section 15, Charter Act, in giving this Court a general power of superintendence over the Subordinate Courts, vests in it a power somewhat analogous to that of the King's Bench Division in the Supreme Court in England to interfere by mandamus."

I am satisfied upon this investigation that the power of superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction, or in excess of jurisdiction or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity had been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial however erroneous in law or fact that decision may appear to be. The only question for decision in the case before us is: Had the Magistrate jurisdiction to make an order under Ch. 12? There is no question of any irregularity in the form of his proceedings.

From the petition of Parmessar Singh himself it is clear that there was a likelihood of the breach of the peace. The Magistrate had materials before him upon which he had jurisdiction to take action under Ch. 12. His proceedings were in order. His jurisdiction under Ch. 12 was complete. In the allegation that the Magistrate's orders deal with more land than is covered by the claim of the opposite party, there is no substance whatever. Our attention has been called to the case of *Doulat Koer v.*

13 (1869) 11 W R 402.

14. (1875-78) 1 All 101.

15. (1888) 11 Mad 220 (F B).

16. (1894) 17 Mad 410 (F B).

17. (1899) 26 Cal 138.

18. (1904) 31 Cal 437=31 I A 71 (P O).

19. (1906) 33 Cal 68.

20. (1909) 36 Cal 934=3 I O 861.

21. A I R 1914 Cal 607 =41 Cal 876=22 I O 848.

Rameswari Koeri (22), in which Prinssep, J., and Wilkins, J., held that a Magistrate had no jurisdiction to interfere in cases in which the civil Courts had recently made a pronouncement in respect of title. This ruling was followed in *Kunja Behari Das v. Khetra Pal Singh* (23). On the strength no doubt of these decisions the Calcutta High Court in *Atul Hazra v. Uma Charan Changdar* (24) set aside as without jurisdiction an order made in similar circumstances. But that this is not the universal practice of the Calcutta Court is clear from the case of *Kulada Kinkar Roy v. Donesh Mir* (3):

"There is no inflexible rule of law that a Magistrate in deciding the question of possession under S. 145, Criminal P. C., is concluded by every previous order of a Civil or Criminal Court relating to the subject of dispute and that the weight to be attached to any such previous order must depend upon the facts and circumstances of the particular case."

With this view I entirely agree. The weight to be attached to each order is a question for the consideration of the Magistrate and as laid down in *Shiva Nathaji v. Joma Kashinath* (2),

"The Court will not substitute its own appreciation of evidence or its own judgment thereon for the determination of the inferior Court in any matter committed by the Legislature to the discretion of such Court."

I am of opinion that we have no authority to go into the merits of the case. I would therefore, reject this application.

V.S./R.K. *Application dismissed.*

22, (1899) 26 Cal 625.

23, (1902) 29 Cal 208.

24, (1916) 33 I C 822.

A. I. R. 1916 Patna 299

CHAMIER, C. J. AND JWALA PRASAD, J.
Chintaman Singh — Defendant — Appellant.

v.

Chuni Sahu — Plaintiff — Respondent.

Second Appeal Nos. 1679 and 2111 of 1914, Decided on 30th March 1916, from decision of Dist. Judge, Bhagalpur, D/- 14th March 1914.

Civil P. C. (1908), Ss. 47 and 144—Decree varied—Claim in restitution by suit is not barred—If Claim can be had exclusively in execution suit may be treated as application under S. 47 and amendment should be allowed.

Section 144, Civil P. C., is intended to be confined to cases in which the decree of a Trial Court is varied or reversed by some superior Court or by reason or some order passed by a superior Court. In such cases claims for resti-

tution can only be enforced by proceedings in the suit under the said section. Where a decree is varied or set aside by the Court passing it, a claim in restitution enforced by means of a suit is not barred by the provisions of S. 144, Civil P. C. Plaintiffs obtained an *ex parte* decree against the defendant and in execution thereof caused the defendants' holding to be sold and purchased it themselves. The *ex parte* decree was afterwards set aside. The defendant instituted the present suit for the value of crops reaped by the plaintiffs before the cancellation of the decree. It was pleaded in defence that the suit was barred both under Ss. 47 and 144, Civil P. C.:

Held: (1) that S. 144, Civil P. C. was no bar to the suit; (2) that as the purchasers at auction were the decree-holders themselves and the sale was as a matter of course liable to be set aside at the instance of the judgment-debtors the absence of a specific prayer for setting aside the sale was not a defect fatal to the suit and that, if necessary, the plaint might be amended so as to include that prayer; (3) that if the relief could be had exclusively by means of an application under S. 47, Civil P. C., the plaint might be treated as an application under the said section. [P 300 C 1, 2]

Quaere.—Whether the relief claimed could be obtained only by means of an application under S. 47, Civil P. C. [P 300 C 1]

Guru Das Sinha—for Appellant.

Lal Mohan Ganguli—for Respondent.

Judgment.—The appellants obtained an *ex parte* decree for rent against the respondents in execution of which they caused the respondents' holding to be put up for sale and purchased it themselves. Subsequently the *ex parte* decree was set aside but in the meantime the appellants had been placed in possession and they had reaped the crops on the land. The *ex parte* decree having been set aside the suit was restored to the pending file and the appellants have, we are told, obtained another decree for rent against the respondents. In the suit out of which this appeal has arisen the respondents claim a decree for Rs. 723 odd on account of the value of the paddy and other produce of the land taken by the appellants during the time that they had possession of the holding. The Courts below have concurred in decreeing the claim.

In second appeal the first point taken is that the suit is barred by the provisions of S. 144, Civil P. C. That section provides that where and in so far as a decree is varied or reversed, the Court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made etc. This section takes the place of S. 583, Civil P. C.,

1882. The latter section was confined to cases where a party was entitled to any benefit by way of restitution or otherwise under a decree passed in an appeal under Ch. 41 of that Code, on the strength of the omission of the words "decree passed in appeal" it is contended in the present case that S. 144 of the present Code applies to the case of a decree being varied or set aside by the Court which passed it. It seems to us however, that the words "Court of first instance" show clearly that S. 144 is intended to be confined to cases in which the decree has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. The words "Court of first instance" seem to be used to distinguish the Court which is to grant the restitution from some other Court which has varied or reversed the decree. In our opinion the suit is not barred by S. 144. Civil P. C. Next it is contended that the suit is not maintainable in view of the fact that the execution sale has not yet been set aside and that even if S. 144 does not apply to this case, S. 47 applies and the respondent should have presented an application under that section both to have the sale set aside and to obtain the value of the crops and other produce gathered by the appellants. It is true that there is no formal prayer that the sale may be set aside but it is conceded that the decree having been set aside under which the sale was held and the purchasers at auction being the decree-holders themselves the sale must as a matter of course be set aside at the instance of the judgment-debtors. In these circumstances the absence of a specific prayer that the sale may be set aside cannot be treated as a fatal defect in the suit. If necessary the plaint might be amended so as to include a prayer that the sale may be set aside. The contention that the relief claimed might have been obtained by means of an application under S. 47, Civil P. C., may or may not be correct. If such an application should have been presented instead of the present suit being brought, we may treat the plaint in the present suit as an application under S. 47. Previous to the passing of the present Code of Civil Procedure great confusion and much injustice resulted from the difficulty of determining whether a suit should be brought or an application presented under what was then S. 244 of

the Code. Sub-S. (2), S. 47 of the present Code was decided to meet cases like the present one. According to the decisions of the Calcutta High Court to which our attention has been drawn, it would appear that the proper course for the plaintiffs in the present suit to pursue was to present an application under S. 47 while according to the Allahabad High Court no such application could have been presented and the proper remedy was by suit. Following the Calcutta decisions we propose to treat the plaint in this suit as an application under S. 47. On the merits there can be no doubt that a decree was rightly passed in favour of the respondents. This appeal is therefore dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 300

CHAMIER, C. J. AND JWALA PRASAD, J.
Krishna Dayal Gir—Decree-holder—Appellant.

v.

Mt. Sakina Bibi and others — Judgment-debtors—Respondents.

Appeal from original order No. 71 of 1914, Decided on 27th April 1916.

(a) Civil P. C. (1908), S. 48—Mortgage decree passed before new Court — Application for execution after 12 years is barred — General Clauses Act (1897), S. 6.

Section 48, Civil P. C. 1908, applies to decrees for sale. [P 302 C 2]

An application for execution of a mortgage decree made more than 12 years after it was passed is barred under S. 48, Civil P. C., and the fact that the old Code of 1882 was in force at the passing of the decree will not prevent the operation of the said section as no vested right in the procedure prescribed by that Court was acquired by the decree-holder within the meaning of S. 6, General Clauses Act: 40 Cal 704; 19 I C 899; 19 I O 793 *Rel. on*; 32 All 499, *Disappr.* [P 301 C 2]

(b) Civil P. C. (1908), S. 48—Acknowledgment does not save bar under S. 48—Limitation Act, S. 19.

The words "fresh period of limitation" in S. 19, Lim. Act, do not refer to the term of 12 years prescribed by S. 48, Civil P. C., hence an acknowledgment under S. 19, Lim. Act, whether made before or after the passing of the new Civil Procedure Code, 1908, will not give the decree-holder a further period of 12 years from the date of the acknowledgment within which to apply for execution of his decree. [P 302 C 1]

(c) Execution—Application for when continuation of prior application explained.

Per *Chamier, C. J.*—An application for execution cannot be treated as a continuation of a prior application where the relief asked for is different and is directed against property not touched by the first application. [P 302 C 2]

(d) **Limitation Act (1908)**—Act governs all proceedings from date of its enactment.

Per *Jwala Prasad, J.*—The law of limitation is a branch of the adjective law and governs all proceedings to which it is applicable from the date of its enactment. [P 303 C 1]

Hassan Imam, S. Sinha, Kailaspati, S. N. Pandit and Gobardhan Misra—for Appellant.

Muhammad Mustafa Khan—for Respondents.

Chamier, C. J.—This is an appeal against an order of the Subordinate Judge of Gaya, dismissing an application made by the appellant for execution of a decree. The facts are as follows: A decree nisi was passed for the sale of mortgaged property on 11th August 1896, and was made absolute on 6th February 1898. Various applications were made for execution of the decree with which we are not now concerned. The first application which it is necessary to notice was made on 16th February 1904. It was dismissed by the Subordinate Judge on 23rd January 1905, but was allowed by the High Court on appeal on 28th June 1906. The next application was made on 4th September 1907, and was also disallowed by the Subordinate Judge but was allowed by the High Court on appeal on 29th June 1910. The next application was made on 28th July 1911, and was struck off on 29th June 1912, after the decree-holder had recovered a sum of about Rs. 67,000. The next application for execution was made on 6th September 1912, and was dismissed for want of prosecution on 5th December 1912. Finally the present application for execution was made on 18th July 1913. The Subordinate Judge held that it must be dismissed under S. 48, Civil P. C., as it was made more than 12 years from the date of the decree sought to be executed.

The first question for decision in this appeal is whether S. 48, Civil P. C., applies to the application. The appellant relies upon S. 6, General Clauses Act 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed, or affect any legal proceeding or remedy in respect of any such right. He contends that if S. 48 of the present Civil P. C., is held to apply to the application for execution now in question, the result will be that the right which he had acquired under the Code of 1882 to execute his decree will be

taken away. The point was considered in two cases by the Calcutta High Court and in one case by the Allahabad High Court. In both the Calcutta cases it was held that S. 48 governed an application made after the passing of the Code of Civil Procedure 1908, for execution of a decree for sale passed at a time when the Code of Civil Procedure 1882, was in force: See *Bissessur Sonamat v. Jasoda Lal Chowdhury* (1) and *Jaimangalabati Misra v. Badan Chand Das* (2). The view taken in these two cases is strongly supported by the judgments of Mookerji, J., Carnduff and N. R. Chatterjea, JJ., in the case of *Manjuri Bibi v. Akhel Mahmud* (3). A contrary view was taken by Knox and Karamat Hussain, JJ., in *Konsilla v. Ishri Singh* (4). Those learned Judges were of opinion that a right to enforce execution of such a decree was a substantive right acquired under the Code of 1882 and was not affected by the passing of the Code of 1908. The Calcutta High Court on the other hand held that in such a case it could not be said that the decree-holder had acquired a right under the Code of Civil Procedure, 1882, within the meaning of S. 6, General Clauses Act, 1897. They held that the decree-holder was entitled to execute the decree in accordance with the provisions of the Code of 1882 as long as it was in force but had no vested right in the procedure prescribed by that Code, that the right enjoyed by the decree-holder had been created by the mortgage debt and had merged in the decree passed in the suit and therefore could not be said to have been acquired under the Civil Procedure Code of 1882. The view taken by the Calcutta High Court is supported by a long string of English decisions some of which are referred to by Carnduff, J., in one of the cases cited above. In my opinion the application for execution now in question should *prima facie* be dismissed with reference to S. 48 of the present Civil Procedure Code. It is argued however that the decree-holder was, within the meaning of sub-S. 2 of that section, prevented by fraud or force on the part of the judgment-debtor from executing the decree. There appears to be no force whatever in this contention.

1. (1913) 40 Cal 704=19 I C 391.

2. (1913) 19 I C 899.

3. (1913) 19 I C 793.

4. (1910) 32 All 499=6 I C 188.

The objections put forward against the applications for execution presented on 16th February 1904, and 4th September 1907, were allowed in the first instance by the Subordinate Judge and were disallowed by the High Court on appeal. But it is impossible to hold that the objections put forward on those occasions were fraudulent. They were as already stated accepted by the Subordinate Judge and they raised fair questions for decision. Next it is contended that there was in March 1902 an acknowledgment of liability within the meaning of S. 19, Lim. Act. I will assume, though it is by no means clear, that the petition relied upon did amount to an acknowledgment within the meaning of the Limitation Act. An acknowledgment made in March 1902 gave the decree-holder a fresh period of 3 years within which to apply for further execution of the decree. The contention advanced before us was that the acknowledgment gave the decree-holder a fresh period of 12 years, but this contention overlooks the fact that at the time when the so called acknowledgment was made the Civil Procedure Code 1908 had not been passed and S. 230 of the Code of 1882 did not, according to the decisions of the Calcutta High Court, apply at all to decrees for the sale of mortgaged property.

There seems to be no ground whatever for the contention that the acknowledgment gave the decree-holder a further period of 12 years within which to apply for execution of his decree. S. 48, Civil P. C. 1908, applies to decrees for sale but the passing of that Code cannot be held to give retrospective operation to the so called acknowledgment of March 1902 in such a way as to give the decree-holder a fresh period of 12 years within which to apply for further execution. Nor in my opinion would any such acknowledgment even if made after the passing of the Code of 1908 give a decree-holder a fresh period of 12 years. To construe S. 19 in the way suggested by the learned counsel for the decree-holder appellant would render many of the provisions in Col. 3, Art. 182. Sch. 1, Lim. Act, useless in any case in which acknowledgment of liability had been given. There can, I think, be no doubt that the words "fresh period of limitation" in S. 19, Lim. Act, do not refer to the terms of 12 years prescribed by S. 48, Civil P. C. Lastly

it was contended that the present application for execution was one made in continuation of the application presented on 28th July 1911. This contention also must be rejected. Upon the application of 28th July 1911, a large amount of property was put up for sale. The present application for execution contains a prayer that it may be treated as being in continuation of the application of 1911 but it asks for relief altogether different from the relief claimed in 1911 and is directed against property which is not touched by the application of 1911. In my opinion the present application is not one in continuation of the application of 1911. The result is that in my opinion the Court below was right in holding that the present application for execution is barred by S. 48, Civil P. C. I would dismiss this appeal with costs, and would assess the hearing fee at three gold mohurs.

Jwala Prasad, J.—This is an appeal in a proceeding for the execution of a decree. The question is whether the execution of the decree is barred by limitation. The decree for the sale of the mortgaged property was passed on 11th August 1896, and was made absolute on 6th February 1898. The present application for execution was made on 18th July 1913. The Subordinate Judge dismissed the application holding that it was barred under S. 48, Civil P. C., Act 5 of 1908, inasmuch as it was made more than 12 years from the date of decree sought to be executed.

The contention on behalf of the appellant is that S. 48 of the present Code does not apply to the application for execution as the decree in question was passed when the old Act of 1882 was in force, S. 230 of which did not apply to mortgage-decrees, and hence there was no limit of time for the execution of the decree. The contention is based on S. 6, General Clauses Act 1897, which provides that the repeal of an enactment shall not affect any right acquired under any enactment repealed. The contention does not appear to be sound. The decree-holder acquired a right to sell the mortgaged property under the Transfer of Property Act and not under the Code of Civil Procedure which prescribes rules of procedure for the enforcement of the decree through the aid of the Court. The rule that no order for the execution of a decree shall

be made after 12 years from the date of the decree is a rule of procedure and is a part of the Procedure Code. The decree-holder did not acquire any right under S. 230 of the Act of 1882 and hence its repeal by the present Code did not destroy any vested right in him. The application for execution will therefore be governed by S. 48, Civil P. C., of 1908 that was in force at the time when the application for execution was made. This view is supported by a series of decisions of the Calcutta High Court and is based upon the principle that the law of limitation is a branch of adjective law and governs all proceedings to which it is applicable from the date of its enactment.

It is further contended that the period occupied in the litigation on account of the objections put forward by the judgment-debtors against the applications for execution presented on 16th February 1904 and 4th September 1907 should be excluded. The objections were partly allowed by the first Court but were disallowed by the High Court on appeal. These objections certainly could not be said to be fraudulent within the meaning of S. 48, Civil P. C. The third contention of the decree-holder is that the judgment-debtors acknowledged their liability in a petition dated 17th March 1902 presented in Court in Execution Case No. 54 of 1901 and hence the decree-holder is entitled to a fresh period of 12 years from the date of the said acknowledgment. For the reasons given by the learned Chief Justice in his judgment I agree that the contention should be rejected, the last contention of the decree-holder is that the present application is in continuation of the application made in 1901. It appears from the order dated 29th June 1912 that the execution case was dismissed on part satisfaction on the prayer of the decree-holder. It is impossible to treat the present application as a continuation of that dismissed application. The result is that I agree with the learned Chief Justice in the order proposed by him and would dismiss the application with costs.

By the Court.—The order of the Court is that the appeal is dismissed. The hearing fee is assessed at three gold mohurs.

V.B./R.K

Appeal dismissed.

A. I. R. 1916 Patna 303

MULLICK AND ATKINSON, JJ.

Midnapur Zamindari Co., Ltd.—Decree-holders—Appellants.

v.

Ajamber Singh Mura and another—Judgment-debtors—Respondents.

Second Appeal No. 595 of 1915, Decided on 1st November 1916, from an order of Dist. Judge, Manbhum, D/- 18th September 1915.

Chota Nagpur Tenancy Act (1908), Ss. 77 and 208—Ghatwali tenure—Right of nomination with Government—Rent decree—Tenure is not saleable.

A ghatwali tenure is not saleable in execution of a decree for arrears of rent in cases where the right of nomination of the ghatwal rests not with the Raja but with the Government : 9 Cal 187 (P C), *Foll.* [P 304 C 2]

P. R. Das and S. N. Palit—for Appellants.

Fakhruddin—for the Crown.

Mullick, J.—This appeal arises out of a decree for rent obtained by the plaintiffs, the Midnapur Zamindari Co., who are ijaradars under the Raja of Dhalbhum. The decree was obtained in respect of a ghatwali tenure of which the lawful ghatwal was Braja Mohan Singh. As he was minor, an acting appointment in the office was made and his guardian Ajamber Singh filled the post during the period for which the present suit for rent was instituted. The plaintiffs having obtained a decree against the acting ghatwal Ajamber Singh, there were various proceedings in execution but the case was eventually remanded by the District Judge to the lower Court for disposal after hearing the objections of the Deputy Commissioner representing Government and of Braja Mohan Singh who had by then succeeded to the office of ghatwal on attaining majority. The execution Court decided after hearing all the parties that the tenure was not saleable in execution of a decree for arrears of rent. Against that decision there was an appeal to the District Judge, who also came to the same conclusion. The present appeal before us is against the decision of the District Judge.

The substantial question we have to decide is whether the decree-holder is competent to bring the ghatwali tenure to sale in execution of his decree, even though the person who acted as ghatwal at the time when the arrears accrued is no longer acting in that office. The learned vakil relies on S. 208, Chota Nagpur

Tenancy Act, which prescribes that a tenure unless the Commissioner of Division objects is liable to sale in execution of a decree for arrears of rent. The learned District Judge however finds that the ghatwali tenure before us is subject to the incident of non-saleability in execution of a decree for arrears of rent and relying on S. 77, Chota Nagpur Tenancy Act, he holds that S. 208 of the Act cannot be given full force and effect.

Now although the materials before us for investigating the early history of the tenure are very scanty we do find from a report submitted by an Assistant Superintendent of Survey named Munshi Nandjee that the tenure was created by a former Raja of Dhalbhum for the protection of the passes and for police duties that in 1883, after disputes had arisen between the Raja on the one hand and the ghatwal on the other, a Survey was made by Government of all the ghatwali tenures of Pergannah Dhalbhum and that on 8th May 1885 a compromise was effected between the Raja, the ghatwal and the Bengal Government as represented by the Commissioner of the Chota Nagpur Division. It would appear from the evidence before us that although the Government had no proprietary interest in the tenure, their interest in the integrity and the devolution of the lands has been recognized at least since 1837. That interest was further affirmed and defined by the above mentioned compromise and it was in clear terms agreed that the power of nominating the ghatwal vested in the Government who were competent at any time to dismiss a ghatwal for default of duty and to put his successor in possession of the tenure. This power of nomination is the crucial point in the case because once that is admitted, the law according to their Lordships of the Privy Council in *Nilmoni Singh Deo v. Bakranath Singh* (1) seems clearly to direct that it is not open to the zamindar to sell the tenure in execution of a decree of rent. That decision has been followed by this Court in the case of *Lakshmi Narain Mahto v. Satya Narain Chakravarty* (2). In *Nilmonnee Singh's Case* (1) their Lordships of the Privy Council deal with a ghatwali tenure in the district of Manbhumi but after noticing the cases of *Raja*

Lelanund Singh Bahadoor v. Government of Bengal (3) *Raja Lelanund Singh v. Doorgabutty* (4) *Benode Ram Sein v. Deputy Commissioner of the Sonthal Pergannahs* (5) and *Rajah Nilmonnee Singh v. Bukronath Singh* (6) all of which related to ghatwali tenures of other districts, their Lordships came to the conclusion that a ghatwali tenure is not saleable in execution of a decree for arrears of rent in cases where the right of nomination of the ghatwal rests not with the Raja but with Government. Stated broadly the reason for the decision was that the purposes for which the tenure was created could not otherwise be carried on. Following that decision, I think that it is quite clear that in the present case the right to sell the tenure does not lie in the decree-holder. It may be that this is a limitation upon the rights of the proprietor but the proprietor himself in effect recognized the limitation by the compromise of 1885 and it does not appear to me that he or his successor-in-interest can now complain on the ground of hardship. The appeal will therefore be dismissed with costs, hearing fee five gold mohurs.

Atkinson, J.—I concur.

V.B./R.K.

Appeal dismissed.

3. (1854-57) 6 M I A 101=1 Sar 505 (P O).

4. Special No. Weekly Reporter 249.

5. (1867) 7 W R 178.

6. (1869) 10 W R 255.

A. I. R. 1916 Patna 304

MULLICK AND ROE, JJ.

K. L. Mackenzie—Defendant—Appellant.

v.

Rameshwar Singh Bahadur—Plaintiff—Respondent.

Second Appeal No. 2891 of 1914, Decided on 28th March 1916, from decision of Dist. Judge, Purnea, D/- 28th July 1914.

(a) Contract Act (1872), S. 23—Lease—Agreement to trade in particular place is not against public policy.

The defendant executed a kabuliyat in favour of the plaintiff agreeing to pay him a specified rent for the privilege of carrying on a trade within a certain area. In an action for arrears of rent brought by the lessor, the defendant pleaded that the contract was in the nature of a monopoly and was therefore void under S. 23, Contract Act:

Held: that as the lessor did not bind himself against giving a similar lease to others the contract was not opposed to public policy and was not void under S. 23, Contract Act: 28 *Mad* 520, *Dist.* [P 305 C 2]

1. (1883) 9 Cal 187=9 I A 104 (P C).

2. (1916) 1 P L J 197=36 I C 269.

(b) Limitation Act (9 of 1908), Arts. 110 and 116—Lease registered—Suit for rent is governed by Art. 116 and not by Art. 110.

A suit to recover the rent reserved in a registered kabuliyat is governed by Art. 116 and not by Art. 110. Lim. Act: 19 Cal 489, Rel. on.

[P 305 C 1]

Lal Mohan Ganguli—for Appellant.

Purnendu Narayan Sinha—for Respondent.

Mullick, J.—The defendant executed a kabuliyat in favour of the Maharaja of Darbhanga agreeing to pay a rent of Rs. 1100 per year for the privilege of carrying on a trade in hides within Zilla Birnagar in Pargana Dharampur. In a suit for rent brought by the lessor the defendant pleads that the kabuliyat is void on two grounds firstly under S. 27, Contract Act, as being in restraint of trade and secondly under S. 23, Contract Act, as being against public policy.

The Courts below have both decreed the suit and hence this second appeal by the defendant. The contention under S. 27, Contract Act, is given up. With regard to S. 23 it is urged that a settlement to carry on trade in the whole of Zillah Birnagar tends to create a monopoly and is therefore against public policy. I do not think there is any substance in this contention. The terms of the lease do not say that the lessor binds himself against giving a similar lease to any one else and on a reading of the whole lease it is quite clear that nothing in it offends against public policy. Reference has been made to the case of *Somu Pillai v. Municipal Council of Mayavaram* (1). But that case does not help the appellant because there the Court was dealing with contracts made by a Municipal authority under statutory orders. I hold that there is no substance in the argument based on S. 23. Then it is contended that the suit is barred by limitation under Art. 110, Lim. Act. It is quite clear on the authority of *Raniganj Coal Association, Limited v. Jadoonath Ghose* (2) that the proper article applicable is Art. 116, Lim. Act, and that the period of limitation, the lease being a registered lease, is six years. It was contended finally that the contract rate of interest should not have been decreed, no reason has been given why the lower Court's decree in this respect is wrong and the

result is that the appeal is dismissed with costs.

Roe, J.—I concur.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 305

SHARFUDDIN AND ROE, JJ.

Raghubar Singh—Defendant — Appellant.

v.

Ram Ghulam Missir and others—Plaintiffs—Respondents.

Second Appeal No. 345 of 1916, Decided on 21st June 1916, against decree of Offg. Dist. Judge, Durbhanga, D/- 12th December 1916.

(a) Bengal Tenancy Act (8 of 1885), S. 87—Test of abandonment of homestead land stated.

The only test of abandonment of homestead land within the meaning of the Bengal Tenancy Act, S. 87, would be discontinuance of residence in the village.

[P 306 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 87—Purchaser of non-transferable homestead is trespasser and can be ejected.

The purchaser of a non-transferable homestead from a tenant is a mere trespasser and is liable to ejection by the zamindar within whose zamindari the land is situate.

[P 306 C 1]

Ganesh Dutt Singh—for Respondents.

Judgment.—The facts of this case briefly are that on a partition between two landlords the house of a raiyat of an undivided estate fell within the putti of one landlord and the cultivable lands in the putti of another landlord. Subsequently to this partition the raiyat sold the house to the defendant, who is now appellant. The landlord brought a suit in the Munsif's Court for ejection of the defendant. The suit was dismissed on the ground that there had been no abandonment. In appeal to the District Judge the suit was decreed and the purchaser turned out as a trespasser. In appeal the ground taken is that the Munsif found that there had been no abandonment and that the learned District Judge endorsed this opinion by a finding that the abandonment and entry by the landlord had not been proved. It was therefore urged that the Bengal Tenancy Act should be applied and that it should be said that there being no abandonment, the landlord was not entitled to enter. The case-law which has been quoted shows that the question of abandonment is not a mixed question of law and fact, but a pure question of fact unassailable in second appeal.

1. (1905) 28 Mad 520.

2. (1892) 19 Cal 489.

In reply it is argued, first, that it is for this Court to consider what constitutes abandonment and, secondly, that there is no question in these cases of the Bengal Tenancy Act. Where it is shown that a party is a trespasser he is liable to ejectment from land within the ambit of the plaintiff's zamindari. Upon the first part of the argument we need not enter, we need only say that there is in this case home-stead land of which cultivation is unnecessary. The land is shown as belagan land. The only test, therefore, of abandonment within the meaning of the Bengal Tenancy Act would be discontinuance of residence in the village and discontinuance of residence in this village by the appellant's vendor has been proved. We base our decision upon the fact that the suit must succeed as an action in ejectment. The land is within the plaintiff's zamindari; he is entitled to maintain a suit for possession of it and to put the defendant-appellant to proof of his title to remain on the land. The defendant-appellant, having no title to remain on the land being the purchaser only of a non-transferable homestead, is a trespasser, not a tenant claiming protection under the Tenancy Act. He is liable to be ejected. The appeal is, therefore, dismissed with costs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 306**

SHARFUDDIN AND ROE, JJ.

Brij Behari Lal and another—Defendants—Appellants.

v.

Shevanath Prasad and others—Plaintiffs—Respondents.

First Appeal No. 74 of 1913, Decided on 8th June 1916, from decision of Dist. Judge, Darbhanga, D/- 14th November 1912.

(a) Practice—Appeal—Suit dismissed for want of cause of action—Appeal by defendant does not lie against finding not in his favour.

Where a suit is dismissed for want of cause of action, no appeal lies at the instance of the defendant against a finding of fact which is not in his favour: 18 Cal 647 and 7 All 606 (F B), Ref. [P 306 C 2]

(b) Civil P. C. (5 of 1908), S. 92—Cause of action for suit under S. 92—Absence of misfeasance—Jurisdiction—Order for costs from estate of trust.

Under S. 92, Civil P. C., no cause of action arises save in the case of an alleged breach of a trust for a public purpose or where the direction of the Court is deemed necessary for the ad-

ministration of any such trust. When a Judge in a case under S. 92, Civil P. C., comes to a decision that there has been no misfeasance, his jurisdiction in the matter ends. He cannot record a decision binding on the parties that the trust is a public trust, nor can he make an order for the payment of costs from the estate of the trust. [P 307 C 1]

*Dwarka Nath Mitter, Bejoy Kumar Bhattacharji and Baikuntha Nath Mitter—*for Appellants.

*Lachmi Narain Singh—*for Respondents.

Judgment.—This appeal is directed against a decree of the District Judge of Darbhanga dismissing the plaintiffs' suit. The appeal is by the defendants. A preliminary objection is taken that no appeal lies. We have examined the decree and find that the suit was dismissed because the plaintiffs had no cause of action. The appellant argues that he should be allowed to contest, in appeal to this Court, the findings of fact arrived at by the learned District Judge which are not in his favour. This is against the opinions expressed in *Thakur Magundeo v. Thakur Mahadeo Singh* (1) and *Jamaitunnissa v. Lutfunnissa* (2):

"The findings in a judgment upon the matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him, as declared by the decree, amount to no more than obiter dicta and do not constitute a final decision of the kind contemplated by S. 2, Cl. 2, Civil P. C."

There is in the findings in this suit nothing which can be hereafter quoted against the defendants as *res judicata*. All that has been decided is that on the suit as framed the plaintiffs had no cause of action. There is nothing in the decree against which the defendant can appeal. The appeal must be dismissed with costs. In the special circumstances of the case we assess a special pleader's fee Rs. 300. It is next contended that that part of the decree which awards costs to the plaintiffs out of the estates in the hands of the defendant is open to revision. We are prepared to go into that question when an application for revision under S. 115 shall have been filed. The decree for costs is not a part of the decree itself and no appeal lies against an order as to costs only.

[Next their Lordships took up the case in revision and gave the following]

1. (1891) 18 Cal 647.

2. (1885) 7 All 606 (F B).

Judgment.—By this application we are invited to interfere with the decree for costs made by the District Court of Darbhanga. The facts of the case briefly are that the plaintiffs after obtaining sanction from the Advocate-General instituted a suit against the defendant for his removal from the management of a trust, which was alleged by the plaintiffs to be a public trust. The learned Judge after full inquiry into the facts found that the trust was indeed a public trust, but that the plaintiffs had failed to prove that the defendant had been guilty of misfeasance in connexion with the trust. He therefore dismissed the plaintiffs' suit, but in view of the facts that the defendant had taken as one of his grounds of defence the plea that the trust was not a public trust he ordered that the costs of the plaintiffs should be paid from the trust estate. Under S. 92 no cause of action arises save in the case of an alleged breach of a trust for a public purpose or where the direction of the Court is deemed necessary for the administration of any such trust. Before the learned Judge had jurisdiction to decide the nature of the position of the defendant, it was necessary for the plaintiffs to show a cause of action in respect of some such breach or some necessity for a direction by the Court. From the moment the District Judge decided that there had been no misfeasance his jurisdiction in the matter ended. It has generally been the practice of the District Courts to inquire first into the question whether the trust is a public trust or not and this is probably a convenient course. But when the Judge has come to a decision that there was no cause of action, he could not record a decision binding on the parties that the trust was a public trust. Therefore he could not make an order for the payment of costs from the estate as a public trust. Therefore within the meaning of S. 115 the order for costs was without jurisdiction. It must, therefore, be set aside and, in lieu thereof, an order made that each side will bear its own costs. We make no orders as to the costs of the present application.

V.S./R.K.

*Order set aside.***A. I. R. 1916 Patna 307**

MULLICK J.

Raziuddin Hossain and others—Appellants.

v.

Bendeshari Prasad Singh — Respondent.

Second Appeals Nos. 462 and 372 of 1915, Decided on 11th July 1916, against order of Dist. Judge, Gaya, D/- 7th September 1915.

(a) **Bengal Tenancy Act (8 of 1885), S. 174**—**Order under—Is not appealable.**

No appeal lies from an order under S. 174, Ben. Ten. Act. [P 308 C 1]

(b) **Civil P. C. (5 of 1908), O. 21, R. 89**—**No second appeal lies.**

No second appeal lies from an order under O. 21, R. 89, Civil P. C. [P 308 C 1]

(c) **Bengal Tenancy Act (8 of 1885), S. 170**—**Obiter—Decree not for entire rent arrears is not rent decree (obiter).**

Obiter.—A decree not obtained in respect of the entire rent arrears of a holding is not a decree for rent within the meaning of S. 170, Ben. Ten. Act. [P 308 C 1]

(d) **Civil P. C. (5 of 1908), O. 21, R. 89**—**Application to deposit by share holder in mokarrari in respect of portion sold is one under R. 89 and not under Bengal Tenancy Act (8 of 1885), S. 174.**

An application by a shareholder in a mokarrari to deposit the purchase-money in respect of a portion of the mokarrari sold in execution of such a decree falls under O. 21, R. 89, Civil P. C., and not under S. 174, Ben. Ten. Act.

[P 308 C 1]

(e) **Landlord and Tenant—Under tenure—Private splitting up of jama does not mean division of holding.**

A mere splitting up of the jama by private arrangement would not necessarily mean a splitting up of an under-tenure. [P 308 C 1]

Lachmi Narain Singh and Nirsu Narain Singh—for Appellants.

Kulwant Sahai and Gurusaran Prasad—for Respondent.

Judgment.—It is admitted that Kali Prasad and others held a dar-mokarrari extending over the whole of Mauza Nasratpur Phulwaria and that originally the rent was payable to 3 sets of mokarraridars, represented by Raziuddin and others who owned 4 annas 11 dams odd, by Abdul Wahab who owned 4 annas 16 dams odd and by Taharat Hussain who owned 6 annas 11 dams odd. Raziuddin brought a suit for arrears of his share of the rent and purchased that fraction of the dar-mokarrari which was represented by his share; but the decree not being fully satisfied he attached the interest of the dar-mokarraridar in that portion for which rent was paid to Abdul Wahab. Previous to this Abdul Wahab

had obtained a decree against the dar-mokarraridar for his share and after Raziuddin's purchase, he brought the interest of the dar-mokarraridar in his portion of the mokarrari to sale and at that sale the respondent before me Bindeshri Prasad, was the auction-purchaser.

Raziuddin now comes forward to deposit the auction-purchaser's dues either under S. 174, Ben. Ten. Act, or under O. 21, R. 89, Civil P. C. The Munsif held that he was not entitled to deposit. On appeal the District Judge held that the decree on which the auction-purchaser had purchased being a rent-decree, O. 21, R. 89, was not applicable and as S. 174, Ben. Ten. Act, required that only the judgment-debtor must apply to deposit, the appellant Raziuddin was not competent to get the sale set aside. The present second appeal is preferred by Raziuddin.

It is not clear how any second appeal can lie. If the application is one that comes under O. 21, R. 89, then there is only a first appeal to the district Judge and no further appeal lies to this Court. If the application is one entertainable under S. 174, Ben. Ten. Act, there is no appeal at all. It does not seem necessary, therefore, to examine the facts of the case, but I have taken considerable trouble to go into these facts. From the plaint in Abdul Wahab's suit it would appear that the dar-mokarrari was joint at the time of the suit and that the auction-purchaser's contention that there was a splitting up by contract has not been made out. A mere splitting up of the jama by private arrangement would not necessarily mean a splitting up of the under-tenure. The decree, therefore, obtained by Abdul Wahab was not for the entire arrears and cannot be regarded as a rent-decree within the meaning of S. 170, Ben. Ten. Act. O. 21, R. 89, would, therefore, seem to apply and the appellant would be entitled to get the sale set aside by the payment offered by him. But there is no second appeal and the District Judge having held against him he has no remedy in this Court.

It is contended that the District Judge's order may be revised under S. 115, Civil P. C., but it does not appear to me that there has been any refusal to exercise jurisdiction or any exercise of jurisdiction in an irregular or illegal

manner. Therefore, the application for revision must be disallowed.

The appeal is incompetent and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 308

CHAMIER, C. J. AND SHARFUDDIN, J.
Gajadhar Prasad Singh—Judgment-debtor—Appellant.

v.

Arjun Das and others—Decree-holders—Respondents.

Appeal No. 20 of 1915, Decided on 9th August 1916, from original order of Addl. Sub-Judge, Monghyr, D/- 12th and 14th December 1914.

Civil P. C. (5 of 1908), S. 47—Complaint about misappropriation of attached property by decree-holder must be inquired in execution.

Allegations of misappropriation of attached moveables by the decree-holder acting in collusion with the Court amin should be inquired into under S. 47, Civil P. C., and the party complaining should not be referred to a separate suit.

[P 309 O 1]

P. R. Das, Babus Ganesh Dutt Singh and Jogesh Chunder Roy—for Appellant.

Rai Purnendu Narayan Singh Bahadur—for Respondents.

Chamier, C. J.—This purports to be an appeal against orders passed by the Additional Subordinate Judge of Monghyr, dated 12th and 14th December 1914. The learned counsel for the appellant professes himself quite unable to understand the meaning of the order of 14th December which is: "The execution case is dismissed. Attachment subsisting." No reason has been shown why we should set aside this order. Apparently it means that the application for attachment and sale of immovable property is to stand dismissed, but that the property is to remain under attachment. Whatever may be the meaning of it, the appellant does not now desire that the order of 14th December should be set aside.

The order of 12th December rejects an application made by the judgment-debtor for an inquiry into certain allegations made by him first in a petition dated 7th May 1914, and afterwards in a petition dated 18th August 1914. It appears that the decree-holders in execution of their decree applied for the attachment of a quantity of cut-crops. The judgment-debtors allege that the peon of the Court,

armed with a warrant of attachment, went to the threshing-floor and attached approximately 2,800 maunds of grain, valued at Rs. 9,500 or more, that the decree-holders, in collusion with the peon of the Court, made away with the bulk of the property which had been attached and the peon put up for sale only 74 maunds. The judgment-debtors asked in their first petition for an inquiry into these allegations and they prayed that if it was found that the decree-holders had made away with over 2,700 maunds of grain, they should be debited with the cost of the same. This allegation was repeated in a petition of 18th August in which they said that the decree-holders, in collusion with the peon of the Court, had mis-appropriated about 2,726 maunds of grain with evil motives and in order to derive improper benefit therefrom and that they had induced the peon of the Court to make a false report to the effect that only 74 maunds had been attached. The Subordinate Judge declined to inquire into these allegations, but he made a remark which suggests that he did not believe that there was any truth in them. He referred the judgment-debtors to a regular suit.

The judgment-debtors have appealed.

They contend that the matter is one which should be inquired into under S. 47, Civil P. C. In my opinion the contention of the judgment-debtors is correct. If their allegations are true, the decree-holders have, by means of an abuse of the process of the Court, taken possession of a large quantity of grain placed under attachment, which ought to have been sold in execution of the decree. The Court cannot possibly allow a decree-holder in execution to seize the property of his judgment-debtor and not to account for it. In my opinion evidence should have been taken and a proper inquiry held. The case appears to me to fall within the terms of S. 47, Civil P. C. I would allow this appeal, set aside the order of the Subordinate Judge dated 12th December 1914, and direct that an inquiry be held into the allegations made by the judgment-debtors. The decree-holders must pay the costs of this appeal. Hearing-fee two gold mohurs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 309

MULLICK, J.

Fakira Lal Sahu—Plaintiff—Appellant.

v.

Ram Charan Lal—Defendant—Respondent.

Second Appeal No. 1685 of 1914, Decided on 11th April 1916, from decision of Dist. J., Saran, D/- 23rd March 1914.

Limitation Act (9 of 1908), Sch. 1, Art. 142—Presumption of possession from title—Evidence equally unworthy on both sides—Arable land—Suit for possession—Absence of evidence to possession—Presumption arising from title does not save limitation under Art. 142.

The presumption of possession from title arises only in cases where the evidence of possession is equally strong on both sides. This principle does not apply to cases in which the evidence is equally unworthy of credit on both sides except in respect of land of a special character, such as waste, jungle or land under water. In case of arable land, in the absence of evidence on either side as to possession, the presumption arising from title does not save limitation under S. 142, Lim. Act. [P 309 C 2; P 310 C 1]

Sailendra Nath Palit for S. N. Guha—*for Appellant.*

Kulwant Sahay for *Harihar Prasad Sinha*—*for Respondent.*

Judgment.—It is admitted that the plaintiffs have proved their title to the land. The only question is whether the plaintiffs have proved possession within 12 years of the suit. The land is arable land and capable of the ordinary modes of possession. Both parties adduced evidence of cultivation and the Munsif found the plaintiffs' evidence worthless and that of the defendant good, and held that the plaintiffs had not proved possession within 12 years. On appeal the District Judge finds that the evidence for the defendant is "very poor", by which I presume he means that it cannot be believed, and then he says that:

"The plaintiff has the misfortune of not having anything better on his own side and his oral evidence of possession is not good enough to support a decree.

By this he means, I presume, that the plaintiffs' evidence is equally unworthy of credit. Therefore, the position which the learned vakil for the appellant maintains before me is that the evidence of possession being equally balanced on both sides, the presumption of possession following title should prevail. But that presumption arises only in cases where the evidence is equally strong on both sides, that is to say, when there is some evidence on both

sides which the Court believes and where by reason of that evidence being equally balanced on both sides, it is extremely difficult to decide the dispute satisfactorily. But the principle does not apply to cases in which the evidence is equally unworthy of credit on both sides except in respect of land of a special character, such as waste, jungle or land under water. The case of *Thakur Singh v. Bhogeraj Singh* (1) following the Full Bench ruling in *Mahomed Ali Khan v. Khaja Abdul Gunny* (2), is authority for this proposition. So also is the judgment of the Privy Council in *Babu Kasturi Singh v. Rajkumar Babu Bissun Pragas Narain Singh* (3), but there is no case which goes so far as to lay down that when there is an absence of evidence on both sides in respect of arable lands, the presumption from title is to operate to save limitation under Art. 142, Lim. Act. It may be said that in principle there is no difference between ordinary lands and waste and jungle lands, but we are bound by the decisions of the Court, and although there are some expressions in *Babu Kasturi Singh v. Rajkumar Babu Bissun Pragas Narain Singh* (3) which might support the argument of the learned vakil for the appellant before me, I do not think that the case goes as far as the learned vakil maintains.

V.S./R.K. *Appeal dismissed.*

1. (1900) 27 Cal 25.
2. (1883) 9 Cal 744 (F B).
3. (1904) 8 C W N 876.

A. I. R. 1916 Patna 310

ROE AND JWALA PRASAD, JJ.
Girwar Narain Mahton and others—
Plaintiffs—Appellants.

v.

Makbulunnissa and others— Defendants—Respondents.

First Appeal No. 510 of 1914, Decided on 28th June 1916, from decree of 2nd Sub-Judge, Chapra, D/- 28th August 1914.

(a) Civil P. C. (5 of 1908), O. 1, R. 9 and O. 34, R. 1—O. 1, R. 9 is subject to O. 34, R. 1—All persons interested must be joined—Non-joinder of all persons interested in mortgage results in dismissal of suit.

Order 1, R. 9, Civil P. C. is subordinate to O. 34 R. 1, which makes it imperative that in a mortgage suit all persons interested in the mortgage security shall be joined as plaintiffs.

[P 311 C 2]

A mortgage is indivisible and if upon the record there be not found all parties entitled to a

share of the money due under the mortgage the suit must be dismissed in its entirety.

[P 311 C 2]

(b) Civil P. C. (5 of 1908), O. 1, R. 9—All persons interested in joint property not joined before expiry of limitation—Whole suit must be dismissed.

If a plaintiff sues to recover property which is the joint property of two or more persons but omits to join all proper and necessary parties, and when the case comes to trial the rights of those parties, who ought to be added as parties to the suit, are barred by limitation, the suit must be dismissed: 36 I C 77, Ref.

[P 311 C 2]

(c) Civil P. C. (5 of 1908), O. 7, R. 1—Suit by managing member on contract by previous manager—Plaintiff must be described as such.

If a suit is brought in the name of the managing member of a family on account of the breach of a contract entered into by a former managing member it must be clearly stated in the plaint that the suit is by the present managing member, as managing member. His name must be clearly given. It is not sufficient that he should be accidentally on the record as one out of the many members of the family some of whom have been omitted: 33 All 272 (P C) and 34 All 549 (F B), Ref.

[P 311 C 1]

Abani Bhusan Mukerjee—for Appellants.

Kulwant Sahay—for Respondents.

Judgment.—The facts of this case briefly stated are that four brothers named Dumber Mahton, Meghraj Mahton, Fakera Mahton and Shamlal Mahton lent money to the defendants taking as security for the loan a mortgage upon the property set forth in the schedule attached to the plaint. The date of that mortgage was 19th May 1896 and the date of payment 18th May 1901. The suit was instituted on 17th May 1913 by 21 plaintiffs, describing themselves as the heirs and successors of the original mortgagees. The frame of the suit was at once challenged by the defendants. It was pointed out that no less than 10 members of the descendants of the four mortgagees had been omitted from the suit. Thereupon the plaintiffs put in a petition dated 8th August 1914 in the following terms:

"Your petitioners Moulvi Mahton and Sham Lal Mahton are the heads and managers of their respective joint families and in their capacity as the heads and managers, they have instituted this suit on behalf of all the members of their respective joint families. Your petitioners Umrao Mahton, Jograj Mahton, Baiju Mahton and Nanhoo Mahton also have instituted this suit on behalf of all the members of their joint family. Your petitioner Jograj Mahton is the head and manager of his joint family and has instituted this suit on behalf of all members of the joint family in his capacity as the head manager of the family. The persons named in

para. 1 of this petition are not necessary parties to this suit but as the defendants have raised the objection it is necessary in order to avoid the objection of the defendants to bring the undermentioned persons on the category of plaintiffs. Accordingly your petitioners in filing this petition pray that the persons named below may be brought on the category of plaintiffs. A petition on behalf of the above persons is also separately filed praying that they may be made plaintiffs. Your petitioners therefore pray that they may be brought on the category of plaintiffs."

The learned Subordinate Judge held that up to 8th August 1914 the necessary parties had not been brought on the record and that on that date the suit was barred by limitation. Upon a close review of the case law, he decided that he had no option but to dismiss the suit entirely. He also made an order that costs be paid in two separate sets to the defendants. Against this decision the plaintiffs appeal and in support of their appeal the learned vakil urges first that as it was obvious from the first that all the kartas were on the record, therefore the principle laid down in *Kishen Parshad v. Har Narain Singh* (1) saved the suit. The law laid down therein is that where there is an agent appointed to enter into contracts on behalf of the Mitakshara family, it is only proper that that agent should be regarded as representing the family in all suits brought to enforce the contract. It may also be taken as an authority for the proposition that where a contract has been entered into by one karta the succeeding karta, upon the death of the maker of the contract, would be entitled to represent the whole family in a suit upon the contract. But I take it as certain that if it is intended to sue in the name of a managing member of a family on account of a breach of a contract made by a former managing member it must be clearly stated in the plaint that the suit is by that managing member as a managing member. The name of the present managing member must be clearly given. It is not sufficient that he should be accidentally on the record as one out of the many members of the family of whom 30 per cent had been omitted. This I understand to be the view taken in *Hori Lal v. Nimman Kunwar* (2). If this view is correct the proper parties to the suit were brought on the record only on 8th

August when the managing members were named. On that date the suit was barred by limitation.

It is next argued that under O. 1, R. 9, no suit shall fail by reason of misjoinder of parties. But this rule is subordinate to O. 34, R. 1, which makes it imperative that all persons interested in the mortgage security shall be joined as plaintiffs. Nor is it merely a question of misjoinder. Two or three of the absent plaintiffs, if the suit of the present plaintiffs failed on the merits, would be entitled to bring a fresh suit upon the mortgage making the first set of plaintiffs-defendants to the suit and so on ad infinitum. Moreover a plaint must be so framed that on a perusal of the facts set forth in the plaint there can be no reasonable doubt in the mind of the Court as to the nature of the decree to be made upon the suit as framed. On the facts set forth in the written statement and admitted by the plaintiffs to be correct it might be possible for the Court to ascertain what was the sum due to the persons on the record and what sum due to the persons not on the record but what definite portion of the mortgaged property should be held liable for the sums due to those on the record and what definite portion of the mortgaged property should be held not liable, it would be impossible to determine. The whole case-law of India has been directed to one common line of decision that a mortgage is indivisible and that if upon the record there be not found all parties entitled to a share of the money due under the mortgage the suit must be dismissed in its entirety. On this point I have had the advantage of reading the judgment of my brother Atkinson in the case of *Mt. Bhagela Koer v. Abdul Rahman* (3) and I would quote the following passage therefrom:

"Reading all these cases and applying them and the legal principle which they decide it appears to me abundantly clear that if a plaintiff proceeds to trial to recover property which is the joint property of two or more persons and he omits to join all proper and necessary parties, and if when the case comes to trial the rights of those who ought to be added as parties to the suit are barred by limitation then the Court has no alternative but to dismiss the application for want of proper or defective joinder of parties."

The present case is not distinguishable from that case. The suit stood barred by limitation on and after 18th May 1913 and any subsequent joinder of parties

1. (1911) 33 All 272=9 I C 739 =38 I A 45 (P O).

2. (1912) 34 All 549=15 I C 126.

3. (1916) 36 I C 77.

could not cure the defect underlying the plaint. The suit was rightly dismissed. The only question that remains is that of the costs of the lower Court. We cannot conceive any reasonable principle on which on the simple argument on which the case was dismissed two sets of costs should have been given to the contesting defendants. We therefore order that the decree of the lower Court be modified to this extent that the costs be limited to one set to be taken by the defendants jointly. The appeal is otherwise dismissed with costs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 312 (1)**

KINGSFORD, J.

Harbans Prasad Tewari and others—
Plaintiffs—Appellants.

v.

*Ram Kant Tewari and others—*Defendants—Respondents.

Second Appeals Nos. 2824 and 3297 of 1914, Decided on 26th July 1916.

Settlement Record—"Lagan ab tak nahin dia"—Construction.

The description "lagan ab tak nahin dia" used in a Settlement Record, is equally consistent with the possibility that the lands may be "belagan," that is, rent-free, or "kabil lagan" that is capable of assessment. [P 312 C 2]

*Roy and Audh Behari Chowdhry—*for Appellants.

Judgment.—In this case the plaintiffs brought a suit before the Munsif to recover arrears of rent from 1316 to 1319 Fasli in respect of two holdings from the defendants-respondents. The plaintiffs stated the amount of rent and asked in the alternative that if it was held that those were not the actual rents which the defendants were liable to pay, then the rents might be assessed by the Court. The Munsif accordingly assessed the rents and passed a decree in favour of the plaintiffs. On appeal by the defendants the learned Subordinate Judge reversed the decree and dismissed the suit. The plaintiffs appealed. The learned Judge observes that the entry in the Settlement Record is "lagan ab tak nahin dia." He then goes on to discuss the meaning of the word "kabil lagan," and he then notes that the holdings in suit are described as belagan in the Settlement Record, and he holds that by virtue of this description of "belagan" and from other facts in the case it may be presumed that the lands are held rent-free. The Judge is mis-

taken in supposing that the word "belagan" occurs in the Settlement Record with reference to these holdings. The description is merely 'lagan ab tak nahin dia, that is to say' that no rent has been paid up to now. This description is equally consistent with the possibility that the lands may be "belagan," that is rent-free or kabil lagan, that is capable of assessment.

It is clear, therefore, that the conclusion at which the learned Judge has arrived is based upon a misapprehension of the facts. I, therefore, set aside the order of the lower appellate Court and remand the appeal for re-hearing. There is no appearance for the respondents. No order as to costs.

V.S./R.K.

*Case remanded.***A. I. R. 1916 Patna 312 (2)**

ROE, J.

*Madan Mohan Sahay—*Defendant—Appellant.

v.

*Etwar Chand Mahto and others—*Plaintiffs and Defendants—Respondents.

Second Appeal No. 175 of 1916, Decided on 22nd July 1916, against the decision of Sub-Judge, Chapra, D/- 12th November 1915.

Evidence Act (1 of 1872), S. 102—Mortgage bond with endorsement of payment produced by defendant—Burden of proof of existence of debt is on mortgagee—Defendant's possession when can be presumed dishonest stated.

Where in a suit on a mortgage-bond the defendant produces the original bond with an endorsement of payment on it, the burden is cast on the plaintiff of showing that the debt is still outstanding. 34 All 511 (P C), Ref. [P 313 C 1]

But if the defendant's story of payment is ridiculous beyond measure, the Court will presume that the bond came into the defendant's possession through dishonest means. [P 313 C 2]

*Baikuntha Nath Mitter—*for Appellant.

Haribhushan Mukherji for *Sarat Chandra Mukherji—*for Respondents.

Judgment.—In this case the plaintiff sued upon a mortgage-bond of which, alleging that he had lost it in the year 1911, he produced a certified copy. The suit was instituted on 24th June 1914. The defendant produced the original bond in Court and upon it appeared an endorsement which, the defendant alleged, was in the handwriting of the plaintiff and constituted a complete and valid discharge. The Munsiff found as a fact that

there was something very suspicious about the plaintiff's loss of the mortgage-bond, that there was a strong motive proved for a false case by the plaintiff. As regards the actual question of account he wrote:

"Under the circumstances the plaintiff has not been able to rebut the presumption of payment raised, on the other hand the contesting defendant has examined himself as well as Gobind, who wrote the endorsement of payment at the request of Gokul at his request, as also Kuar Ram Gholam and Deoki. They all gave satisfactory evidence as to the payment."

Gokul, it appears, was the father of the present plaintiff and is now dead. On appeal to the District Court, the learned Sub-Judge devoted 35 lines to a consideration of the probability that the bond had been lost as described by the plaintiff and found as a fact that there was nothing improbable in the story of the loss of the bond. He then devoted some 15 lines to the consideration of the defendant's story of payment and said:

"The absurdity of the position cannot go further and it is taxing one's credibility to the utmost to ask one to believe his story, I have no hesitation in concluding that the allegation of payment is altogether a myth. The defendants got hold of the lost document somehow and have tried to impose upon the Court by making a false endorsement of payment upon it."

Against this decision it is urged that the burden of proof has been misplaced and that in the absence of better reasons for setting aside the order of the Munsif, the learned Sub-Judge should have dismissed the appeal and that this Court should hold that there has been a material irregularity of law underlying the decision of the learned Subordinate Judge in this misplacement of the burden of proof. My attention has been drawn to *Chaudhri Mohammad Mehdi Hasan Khan v. Sri Mandir Das* (1), in which the Privy Council has prescribed the precise standard of proof to be exacted from a plaintiff in circumstances exactly analogous to the circumstances of the present case. Their Lordship said:

"The Subordinate Judge was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding, in other words, of showing that the bond came in the defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorised."

In the case now before me I am of opinion that the learned Subordinate

Judge did not go outside the principle laid down by the Judicial Committee. He showed affirmatively that the debt was still outstanding by proving that the story of payment was absolutely ridiculous. It was impossible to prove that the endorsement was a forgery for the reason that the endorser did not sign in his own hand and is now dead, but if it were a fact that the story of payment was beyond measure ridiculous, it is to be presumed that the bond came into the possession of the defendant through dishonest means. I cannot say that there was any error in law underlying the Subordinate Judge's decision. The Judicial Committee in *Chowdhri Mohammad Mehdi Hasan Khan v. Sri Mandir Das* (1) were sitting with jurisdiction to re-open the whole acts of the case. The appeal came before them from a decision of the Court of the Judicial Commissioner reversing the decision of the Subordinate Judge upon the facts. It was open to the Judicial Committee to come to a fresh finding of facts of its own. In the case before me I cannot go into the facts. Clearly no error in law has been committed. The appeal must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 313

CHAMIER C. J. AND SHARFUDDIN, J.

Sajiwan Mahto and others—Appellants.

v.

Gulab Chand Lal and others Respondents.

Second Appeals Nos. 3677 and 4117 of 1913, Decided on 4th July 1916, from decision of District Judge, Patna, D/-15th June 1913.

(a) Bengal Tenancy Act (1885), S. 109-A.—Decision enhancing rent is "decision settling rents"—Appeal does not lie.

A decision, so far as it determines the amount of enhancement, is "a decision settling the rents" within the meaning of S. 109-A, Ben. Ten. Act, and therefore no appeal lies against it.

[P 314 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 50.—Batwara papers not evidence against tenants.

In a suit for enhancement of rent Batwara papers are not evidence against the tenants.

[P 314 C 2]

(c) Bengal Tenancy Act (1885), S. 30 (b).—Suit for enhancement of rent—Basis of assessment.

In settling the rate of enhancement under S. 30 (b) of the Act, the Court must have regard to the nature of the land on which rent is to be assessed. If it is up-land the prices of the up-land staple crop must be considered, while if it is low land

the prices of the low-land staple crop must be considered. [P 315 C 2]

Kulwant Sahay—for Appellants.

Pugh, Jayaswal and Mustafa Khan
for Respondents.

Chamier, C. J.—These are appeals against the decree of the special Judge of Patna modifying orders passed by the Assistant Settlement Officer of Patna. The respondents, who are maliks of two Tauzi numbers, applied to the Assistant Settlement Officer under S. 105, Ben. Ten. Act, to settle the rents of a large number of occupancy tenants most of whom are appellants in this Court. The respondents alleged (a) that the tenants held lands in excess of the areas for which they were paying rent (S. 52) (b) that the rate of rent paid by the tenants was below the prevailing rate paid by occupancy tenants for land of a similar description and with similar advantages in the same village [S. 30 (a)] and (c) that there had been a rise in the average local prices of staple food crops during the currency of the present rent (S. 30) (b). The Assistant Settlement Officer in an admirable judgment, quite a model of what a judgment in such a case should be, found that ground (b) had not been made out but that grounds (a) and (c) had been established. He enhanced the rent of all the tenants by one anna in the rupee. One of the pleas advanced by the tenants before him was that they were tenants at fixed rates. He rejected that plea. As regards all the tenants but 20 he found that the presumption allowed by S. 50 (2), Ben. Ten. Act, did not arise and as regards the 20 tenants he found that the presumption had been rebutted by three kinds of documentary evidence.

Most of the tenants appealed to the Special Judge urging that they were tenants at fixed rates and that grounds (a) and (c) had not been made out. The maliks filed cross-appeals urging that the enhancement on ground (c) had been calculated on a wrong basis. The Special Judge held that the ground (a) had not been established, and that the presumption in respect of the 20 tenants above referred to had been rebutted. With reference to ground (c) the Special Judge held that the enhancement had been calculated on a wrong basis and that it should be 1 anna and 11 1/2 pies in the rupee. He allowed a further enhancement accordingly. The tenants have appealed to this

Court, urging (1) that the Bengal Tenancy Act does not apply to the case at all, (2) that they are not occupancy tenants but tenants at fixed rates and (3) that if an enhancement is allowed, it should be calculated on the basis adopted by the Assistant Settlement Officer. The maliks have filed a cross-appeal to the effect that a still larger enhancement should have been decreed.

The first ground was not pressed and may be disregarded. There is obviously no substance in it. The second ground was pressed only as regards the 20 tenants. The first Court found that the presumption allowed by S. 50 (2) has been rebutted by 3 kinds of documentary evidence, one of which consisted of entries in Batwara papers. The Special Judge ruled, rightly as I think, that the Batwara papers were not evidence against the tenants, but he said:

"I accept the statement of the plaintiff that he realized rent on first taking over the takhta at the rate shown in the Batwara papers, and, if that statement be accepted as correct, the fact that 32 tenants claiming to be raiyats at fixed rates have paid since 1297 a very much larger rent than that shown in the Batwara papers is sufficient to rebut the presumption.

they cannot therefore be raiyats at fixed rates."

There is no such statement by the plaintiff on the record and it appears to me that the Special Judge, while ruling that the Batwara papers were inadmissible, has in fact made use of them as evidence. He did not consider at all the other documentary evidence on the point. There must, therefore, be a fresh finding as regards the 20 tenants. As regards the remaining tenants there is admittedly no ground for holding that they are fixed rate tenants, but we are asked to restore the decision of the first Court as to the amount of enhancement to be decreed. The maliks contend that appeals by the tenants on the question of the enhancement to be allowed are not admissible. Alternatively they contend that a further enhancement should be allowed. It appears to me that that part of the Special Judge's decision which determines the amount of enhancement is "a decision settling a rent" within the meaning of S. 109-A, Ben. Ten. Act, and therefore no appeal lies against it. The original claim of the maliks was that the rents should be settled. In settling the rents the Courts were bound by S. 105 (4) of the Act to have regard to the rules

laid down in the Act for the guidance of the Civil Courts in increasing or reducing rents. They accordingly applied Ss. 30 and 39 of the Act. They have, it is true, as will be seen later, adopted different constructions of these sections but they have nevertheless settled the rents. The decision of the Special Judge, so far as it determines the amount of enhancement, is, therefore, a decision settling the rents and no appeal lies against it. The appeal of the tenants, except the 20 referred to above, must accordingly be dismissed. As there must be a fresh decision by the Special Judge as regards the 20 tenants and he may find that they were not tenants at fixed rates and in that event will have to settle their rents, it would be as well for us to deal with the conflicting views of the Courts below regarding the basis of enhancement under S. 30 (b) of the Act.

The plots in question are all "up-land." S. 39 (7) provides that the Local Government, subject to the control of the Governor-General-in-Council, shall make rules for determining what are to be deemed staple food-crops in any local area, and for the guidance of officers preparing price-lists under that section. The rules now in force in this Province declare that in the Dinapore Sub-Division (where the land in question lies) the staple crops shall be deemed to be barley on up-land and rice on low land. The Assistant Settlement Officer assessed the enhancement by comparing the average price of barley during the decade 1901-1910 with the average price of barley during the decade 1891-1900. The Special Judge assessed the enhancement by comparing the average prices of barley and rice together during those two decades (he spoke of makai but that is probably a slip for barley). He adopted the same principle in the case of *Mangroo Hajam v. Mt. Latifan* but his decision was overruled on 22nd April 1915, by Holmwood and Walmsley, JJ., who said:

"the idea underlying his decision appears to be this, that the rise in the price of staple-food crops diminishes the purchasing power of the rupee in the hands of the landlord and that, therefore, the law allows the landlord more rupees to make up for the diminishing value of the rupee. It is a kind of exchange compensation allowance. We have never met with this suggestion before, and it does not seem to be in accordance with the views which have been taken by this Court in other cases. We have always understood that the enhancement was based upon this ground

that the raiyat can get more money for his produce owing to its increase in value, therefore, he is bound to pay more rent to the landlord."

In that case the Special Judge had put a general enhancement on all sorts of land belonging to 60 different people at an average rate without finding out how much of the land was paddy or low land and how much of it was high land. I agree with Holmwood and Walmsley, JJ., that regard must be had to the nature of the land on which rent is to be assessed. If it is up-land the prices of the up-land staple crop must be considered, while if it is low-land the prices of the low-land staple crop must be ascertained. In the present case all the land is up-land and the calculation must be made with reference to the average prices of the up-land staple food crop, which in this case is barley. I would, therefore, allow the appeals of the 20 tenants (18 appear to be in one case and two in the other) and remand their cases to the Court of the Special Judge for a fresh decision and I would direct that the costs of their appeals shall be costs in the cause. I would dismiss the appeals of the other tenants but I would make no order as to costs. The cross-appeal of the maliks was not pressed; it is dismissed but without costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Order accordingly.

A. I. R. 1916 Patna 315

ROE AND JWALA PRASAD, JJ.

Ram Khelawan Pande—Defendant—Appellant.

v.

Asgar Ali and another—Plaintiffs—Respondents.

Second Appeal No. 1056 of 1915, Decided on 11th July 1916, against order of Dist. Judge, Muzafferpore, D/-27th February 1915.

(a) Civil P. C. (5 of 1908), S. 66—Scope of—It applies when claim is based on auction-purchase.

Section 66, Civil P. C., can only apply where the plaintiff's claim is based upon an auction-purchase but not where it is independent of and prior to the sale. [P 316 C 2]

(b) Civil P. C. (5 of 1908), S. 47—Scope of—Question between Judgment-debtor and his partner not party to suit—S. 47 does not apply.

Section 47 of the Code does not govern a case between the judgment-debtor and a person who was not a party to the suit but was a partner of the judgment-debtor in the holding which was the subject-matter of the suit. [P 316 C 2]

(c) Civil P. C. (5 of 1908), S. 66—Protection of auction sale even though irregular can be

claimed by purchaser if innocent and not party to fraud.

It is only an innocent purchaser for value, not in any way party to any fraud, who can claim the benefit of a purchase in bad or irregular proceedings in execution of a decree: 14 Cal. 18 (P. C.) and 15 Cal. 557 Ref. [P 371 C 1]

Kulwant Sahai, Naresh Chandra Sinha and Harnandan Sahai—for Appellant.

Muhammad Mustafa Khan—for Respondents.

Jwala Prasad, J.—This is an appeal from the judgment of the District Judge of Muzaffarpore, dated 27th February 1915, reversing the decision of the Additional Munsif of Motihari, dated 26th June 1914. The facts are as follows: The plaintiff-respondent purchased in 1907-08 by means of kobalas 3 bighas 3 cottahs of a holding of 9 bighas of defendant 1st party. Of the remainder, $2\frac{1}{2}$ bighas were purchased by others and 3 bighas 4 cottahs remained in the defendant's possession. On 9th December 1910, the defendant third party, as thekadar of the village, obtained an ex parte decree for recovery of arrears of rent for the entire holding for the years 1314—1317 Fasli against defendant 1 alone. On coming to know of the decree the plaintiff and other purchasers of the holding paid the entire amount of the decree to the decree-holder thekadar and got their names registered in his sarishta. The thekadar granted rent receipts for the years 1313 to 1318 Fasli, separating the jama-zamin of the plaintiff and the other cosharers. Though the decree was thus satisfied, the amla of the thekadar in collusion with defendant 1, the original tenant, fraudulently put the decree into execution and had the entire holding sold. Defendant 1 purchased in the name of defendant 2 the holding put up for sale, took out dakhaldihani and dispossessed the plaintiff. The plaintiff filed objections under O. 21, R. 100, Civil P. C. These were disallowed on 7th September 1912. The plaintiff on these allegations brought this suit to recover possession of the disputed property upon a declaration that defendants 1st and 2nd parties did not acquire any right by the auction-purchase. The plaintiff also prayed for mesne profits during the period of his dispossession, but this claim was abandoned in the lower appellate Court. It has been found as a fact by the lower appellate Court that the rent-decree was satisfied as alleged by the plaintiff, that the sale was the result of a fraudulent

conspiracy between defendant 1 and defendant 2, and that defendant 1 himself purchased the property in the name of defendant 2 and was in possession of it. The learned District Judge set aside the sale and gave to the plaintiff a decree for recovery of possession of the property in suit.

Defendant 2 alone has appealed to this Court. It is contended, firstly, on behalf of the appellant that the plaintiff's suit is barred by S. 66, Civil P. C., inasmuch, as the plaintiff alleges that the purchase of defendant 2 was made on behalf of the judgment-debtor through whom the plaintiff claims title to the property. The contention is manifestly unsound inasmuch as S. 66 can only apply when the plaintiff's claim is based upon the auction-purchase. Here the title of the plaintiff is not derived from the auction sale but is independent of and prior to the sale. Secondly, it is contended that the plaintiff's suit is barred by S. 47, Civil P. C. inasmuch as the questions raised in the plaint relate to the execution, discharge or satisfaction of the decree. The question in this case is not between parties to the suit but between the judgment-debtor, a party to the suit, and one whom we may describe as his partner in the holding. Clearly there could arise between such partners no question under S. 47. The last objection raised by the appellant is that the plaintiff cannot recover possession in this case without getting the sale set aside and that as he has not asked in the plaint to have the sale set aside, the order of the lower appellate Court setting aside the sale is bad. The answer to this argument is that the plaintiff has been deprived of property by fraud. If in order to restore that property to him, it is necessary to set aside the sale, the Court will, subject to the Limitation Act, set aside the sale, even if there be no prayer in the plaint to set it aside. However, the plaintiffs' suit is for a declaration that defendants 1st and 2nd parties, i.e., the judgment-debtor and his benami purchaser have acquired no right by their purchase at the auction sale and that their possession is a trespass. It has been found as a fact that the possession of these persons was obtained by fraud. They cannot set up a title acquired by fraud as an answer to the suit. It is only an innocent purchaser for value, not in

any way party to any fraud, who can claim the benefit of a purchase in bad or irregular proceedings in execution of a decree: *Rewa Mahton v. Ram Kishen Singh* (1) followed in *Mothura Mohun Ghose Mondul v. Akhoy Kumar Mitter* (2) and other cases.

The plaintiff is entitled to have it declared that the sale did not confer any title upon defendants 1 and 2 and to recover possession. The reliefs asked for by the plaintiff are sufficient to safeguard his interests. To set aside the sale might give rise to further confusion and is certainly superfluous. The learned District Judge would seem to have been misled at the Bar as to the nature of the suit. He begins his judgement by saying that the suit was one to set aside the sale. This was not the case. The suit was a suit to recover possession of property of which the plaintiff had been deprived by fraud. The appeal should be decreed in part. The decree of District Court should be discharged. In lieu thereof a decree should be made in the terms of the first, second and third reliefs sought in the plaint, and defendants 1 and 2 directed to pay to the plaintiff costs throughout the litigation.

Roe, J.—I entirely concur. The relief asked for in the plaint can be given without setting aside the sale. The principal defendant is bound to re-admit the plaintiff to possession of the lands of which he has made this fraudulent attempt to deprive him. On the facts found the second defendant is bound equally with the first defendant to stand aside and restore these three big has five cottahs to the plaintiff. The thekadar has recognised the plaintiff. There is no bar to his peaceful occupation of the land.

V.S./R.K. *Appeal partly decreed.*

1. (1887) 14 Cal 18=13 I A 106 (P C).
2. (1888) 15 Cal 557.

A. I. R. 1916 Patna 317

CHAMIER, C. J. AND SHARFUDDIN, J.
Debi Charan Lal and others—Appellants.

v.
Mehdi Hussain and others—Respondents.

Letters Patent Appeal No. 48 of 1916, Decided on 17th July 1916, from the decision of Mullick, J., in S. A. No. 2667 of 1914, D/-4th May 1916.

(a) Limitation Act (9 of 1908), S. 5—Sufficient cause'—Appellate Court's finding shall not be interfered in second appeal.

Where a lower appellate Court, after considering all the circumstances of a case, has come to the conclusion that "sufficient cause" has or has not been established for not filing an appeal within time, a High Court in second appeal will not interfere. [P 318 C 1]

(b) Limitation Act (9 of 1908), S. 12—Time requisite for obtaining copies—Determination of illustrated.

There is no hard and fast rule which determines exactly for all classes of cases the amount of time requisite for obtaining copies within the meaning of S. 12, Lim. Act. The question in each case is, what on the facts of that case was the time requisite for obtaining copies. [P 318 C 2]

A decree in a Court of a munsif was passed, prepared and signed on 27th September. From 82th September to 31st October (both days included) the Court was closed for annual vacation and it re-opened on 1st November. An application for a copy of the judgment was made on 3rd November and for a copy of the decree on 13th November. Both copies were ready and delivered on 21st November and an appeal was filed on 28th November:

Held: that as 27th September, the day on which the judgment was pronounced and the decree signed, was excluded and as from 28th September to 31st October, the Court was closed and an application for copies could not be made, the whole of the time from 27th September to 31st October was part of the time requisite for obtaining copies, where they were applied for on the day on which the Court re-opened or on some later date; 27 *Mad* 21 and 13 *Cal* 104 (*F B*); *All* 461 34 *All* 41 *Ref*; 11 *I C* 339, *Foll*.

(c) Limitation Act (9 of 1908), S. 12—Time requisite for obtaining copies need not be continuous.

The words of S. 12, Lim. Act do not lay down that the time requisite for obtaining a copy must be continuous. [P 319 C 1]

(d) Letters Patent (Patna), Cl. 10—Now point will not be allowed in appeal.

Ordinarily a new point which was not taken before a Single Judge of the High Court, will not be allowed to be taken for the first time in an appeal under Cl. 10 of the Letters Patent [P 319 C 2]

S. Sinha, Parmeshwar Dayal and Babu Abani Bhusan Mukherji—for Appellants.

Mahomed Mustafa Khan and Ray Guru Saran Prasad—for Respondents.

Chamier, C. J.—The question for decision in this appeal is, whether the appellants' appeal to the lower appellate Court was within limitation. On 27th September 1913, the respondents obtained a decree in the Court of a Munsif. Strongly enough, the decree of the Court was prepared and signed on the same day. The annual vacation began on the following morning and the Court re-opened on 1st November. The appellants applied for a copy of the judgment on 3rd November and for a copy of the decree on

13th November. Both copies were ready and were delivered on 21st November. An appeal was filed by the appellants on 28th November. The Subordinate Judge to whom the appeal was transferred for disposal, dismissed it on the ground that it had been filed beyond time, and that the appellants had failed to show sufficient cause within the meaning of S. 5, Lim. Act, for not preferring the appeal within time. The appellants filed a second appeal in this Court. A learned Judge of this Court dismissed the appeal, holding that as the Subordinate Judge had considered all the circumstances of the case and had in the exercise of his discretion come to the conclusion that the appellants had not established sufficient cause within the meaning of S. 5, Lim. Act, this Court could not interfere. It is now settled by a long string of authorities that where a Court after considering all the circumstances of the case has come to the conclusion that sufficient cause has or has not been established for not filing an appeal within time, the High Court in second appeal will not interfere. In my opinion, the learned Judge was right in following those authorities.

But it is contended before us that the time during which the Court was closed should be treated as part of "the time requisite for obtaining a copy of the decree" within the meaning of S. 12, Lim. Act. This point was not taken either before the Subordinate Judge or before the learned Judge of this Court, but I think that we ought to consider it. The appellants rely upon the decision of the Madras High Court in *Saminath Ayyar v. Venkatasubba Ayyar* (1). In that case facts were practically the same as in the present case, except that the appellant applied for a copy of the decree on the day on which the Court re-opened after the vacation. It was held that the time during which the Court was closed was part of the time requisite for obtaining a copy of the judgment. The respondents rely upon the case of *Tanjore Palace Estate v. Andi Ramiah Chetty* (2), in which two other Judges of the same Court declined to hold that vacation was part of the time requisite for obtaining a copy of the judgment delivered five days after the Court closed for the vacation

as the appellant had not applied for a copy till 17 days after the re-opening of the Court. They referred to the case of *Saminatha Ayyar v. Venkatasubba Ayyar* (1) with approval as I read the judgment, but distinguished it from the case before them on the ground that the appellant had not applied for the copy till 17 days after the re-opening of the Court. They concluded their judgment with the observation that they could see no reason for excluding the period during which the Court was closed, except upon grounds which would entitle an appellant to demand the exclusion of every holiday which occurred during the period allowed for the presentation of his appeal.

Different High Courts have laid down different general rules for determining the amount of time requisite for obtaining copies. For example, a Full Bench of the Calcutta High Court held in *Bani Madhab Mitter v. Matungini Dassi* (3) that the time which elapses between the delivery of the judgment and the signing of the decree is part of the time requisite for obtaining a copy of the decree, whether or not the appellant applies for the copy before the decree is signed; while a Full Bench of the Allahabad High Court held in *Bechi v. Ahsanullah Khan* (4) that the time requisite for obtaining a copy does not begin till an application for the copy is made. These and a few other decisions of general application have settled the practice on important points for the provinces subject to those Courts and they suffice for the great majority of cases. But so far as I am aware, no High Court has attempted to lay down any hard and fast rule which shall determine exactly for all classes of cases the amount of time requisite for obtaining a copy.

Subject to any general rules which may have been laid down, it appears to me that the question in each case is, what was in fact the time requisite for obtaining the copy? The decision in *Saminatha Ayyar v. Venkatasubba Ayyar* (1) rests avowedly on the special circumstances of the case. So also does that in *Khub Chand v. Harmukh Rai* (5). I therefore ask myself the question, what was the time requisite for obtaining the copy of the decree in this case? The day on which the judgment was pronounced and the de-

1. (1904) 27 Mad 21

2. (1911) 11 I O 399.

3. (1886) 13 Cal 104 (F B.)

4. (1890) 12 All 461 (F B.)

5. (1912) 34 All 41=12 I O 183.

decree signed in this case must admittedly be excluded. So far as I know, it is the universal practice to exclude the day on which the case was decided for all purposes connected with the calculation of limitation for an appeal. It is common ground that from 28th September to 31st October (both days included) the appellants could not have applied for a copy either of the judgment or of the decree. That being so, it appears to me to follow that the whole of the time which elapsed from the delivery of the judgment to the re-opening of the Court on 1st November 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that this must be so whether the appellant applied for copies on the day on which the Court re-opened or on some later date. In fact it appears to me that the date on which the application for copies was made, has in this case no bearing on the question whether or not the period of the vacation should be deducted. In this respect I am unable to accept the decision in *Tanjore Palace Estate v. Andi Ramiah Chetty* (2). It was suggested that the time requisite for obtaining a copy must be continuous. But the words of the section do not appear to lay down any such rule. In the United Provinces it is the practice to disallow the days which the applicant has wrongly allowed to elapse between the notification of the number of stamped sheets required and the deposit of those sheets. The effect of this is to allow two different periods as time requisite for obtaining the copy.

On the facts of this case I am of opinion that the period of the vacation was part of the time requisite for obtaining the necessary copies. I would therefore, allow this appeal and setting aside the judgment of the learned Judge of this Court and that of the Subordinate Judge, I would remand this case to the Court of the Subordinate Judge to be disposed of according to law. I agree with the learned Judge of this Court in thinking that the decision of the Subordinate Judge with reference to S. 5, Lim. Act, was clearly wrong. As observed above, the point on which this appeal has been allowed was not taken before the Single Judge of this Court. In this connection I take this opportunity of pointing out that the conduct of a case before a Single Judge of this Court must not be regarded as a preliminary canter in which

the parties and their legal advisers are not called upon to exert themselves. Ordinarily I would not allow a point to be taken in appeal under Cl. 10 of the Letters Patent which had not been taken before the Single Judge. In the present case I felt bound to allow a new point to be taken in order to remedy what appeared to me to be a serious failure of justice. I would make the costs of the hearing before the Single Judge costs in the cause, but would leave the parties to pay their own costs of this appeal.

Sharfuddin, J.—I agree.

V.S./R.K.

• *Appeal accepted.*

A. I. R. 1916 Patna 319

MULLICK AND ATKINSON, JJ.

Kandhdeo Narain Singh—Appellant.

v.

Dewa Singh and others—Respondents.

Second Appeals Nos. 1641 and 1829 to 1839 of 1915, Decided on 2nd November 1916, against the decision of Dist. Judge, Gaya, D/- 17th April 1915.

(a) Civil P. C. (5 of 1908), O 41, R. 27—Production of document in appeal—Opportunity to rebut must be given.

Where a Record of Rights is allowed to be produced in evidence in the Appellate Court, an opportunity should be given to the opposite party to rebut the presumption arising out of it.

[P 320 C 1]

(b) Bengal Tenancy Act (8 of 1885,) Ss. 67 and 68—Scope—They are mandatory.

The duty of a Court to award interest or damages on arrears of rent under Ss. 67 and 68 Ben. Ten. Act, is mandatory. It must do either the one or the other

[P 321 C 1]

Jogesh Chandra Roy and Harihar Prasad Sinha—for Appellant.

Rai Gurusaran Prasad and Rajendra Pershad—for Respondents.

Atkinson, J.—In these eleven cases the plaintiffs are zamindars suing the defendants, their tenants, for rent. The cases are numbered 1641 and 1829 to 1838 inclusive. Different considerations apply to Nos. 1641, 1829 and 1836, but with reference to the other cases there are some points in common. The actions were for rent, and the question between the parties mainly was whether the rent was payable upon the danabandi system or upon the batai system. The plaintiffs as zamindars were claiming the rent according to the danabandi system, and the defendants as tenants were contending that their liability was upon the batai system. The matter came before the learned Munsif, who heard the case

in detail and decided in favour of the plaintiffs and awarded the plaintiffs the full measure of their claim together with interest. At the time that the hearing took place before the learned Munsif, which was sometime in August 1914, the Record of Rights was not in existence, but it came into being in or about 18th September 1914, or about 18 days after the decision of the Munsif had been given.

Accordingly application was made on 13th April 1914, three days before the hearing of the appeal before the District Judge, for liberty on the part of the defendants to file the Record of Rights. Liberty was given to file the Record of Rights, but the question as to the admissibility of the document was reserved for the hearing of the case upon 16th April. On 16th, it is quite clear that the learned District Judge, admitted the document, the Record of Rights, but the record is silent as to whether or not he afforded any opportunity to the plaintiffs to tender evidence to rebut the presumption arising from the Record of Rights. I think he was right in admitting the Record of Rights, but I think that when he decided to admit the Record of Rights, it was his obvious duty in the exercise of his judicial discretion to allow the plaintiffs an opportunity to tender rebutting evidence, and because he did not do so renders his decision in this case on that point unsatisfactory, to say the least of it. That point is common to all the cases; it applies to the entire eleven cases, and so far as that point is concerned it appears to us that the case has not been satisfactorily disposed of by the Judge, in the lower appellate Court.

Another point common to all the eleven cases is that the learned Judge, took into consideration matters which were not proved in evidence before him. It appears that a person called Ganesh Lall, who is a patwari of a cosharer of the plaintiffs, living on intimate terms with her, that he in some other proceeding filed a batai khasra, and although Ganesh Lall was not called as a witness nor was the document which he is said to have filed in the other proceeding produced, the learned Judge assumes that his evidence, as he refers to it, cannot be rightly set aside. I do not know what the learned Judge, means by that expres-

sion: it conveys nothing to my mind, because this person Ganesh Lall was not called in this case as a witness and gave no evidence, and if the learned Judge refers to the khasra which he filed in the antecedent proceedings, in my opinion, he was acting entirely illegally in considering that document at all, because the document itself was not produced and no foundation was laid by the defendants for admitting secondary evidence of its contents. Therefore, on those two points common to all the eleven cases the trial has been unsatisfactory.

With regard to the cases Nos. 1641 and 1829, additional considerations apply. There had been between the plaintiffs and the defendants in those suit disputes as to the liability for rent in respect of lands other than the lands now in suit. In the course of the proceedings the parties had agreed to settle their differences, and at that time, as I gather, there was a dispute existing as to the system of rent applicable in reference to these lands, and the parties in that former action agreed to settle their differences and they embodied their decision in the terms of a compromise which was made a decree of the Court, whereby they agreed that not only was the liability for rent in the previous action settled, but that liability for the payment of rent in the present suit in reference to the present lands was also settled; and the parties declared and agreed in the settlement made between themselves, that so far as the lands in this suit were concerned the rent was to be payable on the danabandi system. The learned Judge was tendered these documents, they had been used before the Munsif, and the learned Judge disregarded them. It has been pressed upon us very much by the learned vakil for the defendants, that he considered them in part and disregarded them, because they were outweighed in value by the weight which the learned Judge attached to the entry in the Record of Rights. In my opinion, the learned Judge did not measure legally the full value of those documents, they were very potent and strong, they had been incorporated in the compromise which was made a decree of the Court, and the Judge brushes them aside in the most airy way, and certainly not in a judicial manner.

As far as I can see, he attaches very little weight, if any, to their value in

determining the vital issue in this case, namely, the system upon which the rents were payable. We think that for that reason also these two cases, Nos. 1641 and 1829, should go back for re-consideration and proper trial. In those two cases plus case No. 1836 there is this additional fact that apart from the compromise, which had the force of being a decree, there were also danabandi appraisement papers in existence signed by the tenants in each of these three cases. These documents were tendered in evidence, and the learned Judge disregarded them, because he said there was no evidence to prove that the tenants had signed these danabandi appraisement papers, and he excluded the documents on that ground. Not only was he wrong in that, but the record shows that there was evidence produced to prove that the tenants did sign the documents which had been tendered in evidence. In that aspect of the case we could not for one moment allow his decision to stand on an inference drawn by the learned Judge so contrary to the evidence and so unsatisfactory.

Finally the Judge in this case, although he found that the batai system applied and awarded a measure of rent to be paid, gave no interest and awarded no damages. Clearly his duty was, under S. 67, Ben. Ten. Act, to award interest. The obligation is mandatory under the Staute, and he has power under S. 68, sub-Cl. 2, to award damages if it is a fit and proper case. In this case he disregarded his duty under S. 67, and declined to exercise the power he has under S. 68, he must do one or the other, at least either award interest or award damages. He has done nothing, and the entire proceedings in the lower appellate Court appear to us to be so unsatisfactory that a re-trial of these cases is essentially necessary in the interests of justice. Accordingly we remand the case to the learned District Judge for re-trial in all respects, and then it will be open to the parties to give such further additional evidence, as they may think advisable and necessary, with the permission of the Court. This appeal will be allowed with costs.

Mullick J.—I concur.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 321

CHAMIER, C. J. AND SHARFUDDIN, J.

Debendra Bala Dasi—Plaintiff—Petitioner.

v.

Chandra Sekhar Prasad Singh—Defendant—Opposite Party.

Civil Revn. Petn. No. 117 of 1916, Decided on 18th July 1916, against order of Sub-Judge, 2nd Court, Chapra.

Civil P. C. (1908), O. 21, R. 52—Custody—Disputes relating to money in hands of receiver can be decided by Court in whose custody money is.

A receiver is an officer of the Court and money in his hands is regarded as being in the custody of the Court, therefore the only Court which has jurisdiction to decide disputes relating to such money is the Court in whose custody the money, is and not any other Court: 7 Cal 553, *not Foll.*

[P 322 C 2]

Girija Prosanno Roy Chowdhry and *Bankim Chandra Day*—for Petitioner.

Baldeo Narain Singh, Kulwant Sahay, Laxminarain Singh and *Baidya Nath Narain Singh*—for Opposite Party.

Chamier C. J.—This is an application for revision of certain orders passed by the Subordinate Judge (2nd Court), Chapra. The applicant Rani Debendra Bala Dasi, who is described as executrix of the estate of Suresh Chandra Singh of Paikpara, is the holder for the time being of the Paikpara Estate. It appears that in August 1902, Mr. R. Mitter, who was then receiver of the Paikpara Estate, lent a considerable sum of money to the uncle of respondent 2 and that the mortgage-deed contained a provision that it would be lawful for the mortgagee at any time after the commencement of a suit on the mortgage to apply for and obtain the appointment of a receiver of the mortgaged premises. Consequently in a suit brought by the receiver of the Paikpara Estate in 1907 on the mortgage an application was made to the Subordinate Judge (first Court) Chapra for appointment of a receiver of the mortgaged property. The Subordinate Judge (first Court) disallowed the application. The plaintiff appealed, with the result that the Calcutta High Court set aside the order of the Subordinate Judge and appointed respondent 1 to this application receiver of the mortgaged property

“to collect the rents and profits thereon until final disposal of the suit either by payment of the mortgage-debt or by confirmation of any sale which might take place.”

That order is dated 5th June 1908, and since that date respondent 1 has been in possession of the estate and the mortgaged property and has been receiving the rents and profits thereof. It is stated that for a considerable time respondent 1 made payments to the applicant but discontinued these payment in June 1912, when the mortgaged property was sold in execution of the decree. In consequence of an application presented by the judgement-debtor that sale was set aside on 31st May 1916. In the meantime a considerable sum seems to have accumulated in the hands of the receiver. Respondent 3, Mulka Rani Kuar, has obtained a money-decree for Rs. 22,070, which is declared to be recoverable out of the estate of the original mortgagor. Last year she made an application to the Calcutta High Court praying for permission to attach money in the hands of the receiver in execution of her decree. By order of the Calcutta High Court that application stood over till after the disposal of the proceedings taken to have the sale set aside. It ultimately came up for hearing in this Court and was disposed of by this very Bench. On that occasion we said:

"The only question which we have to decide is whether the applicant Mulka Rani Kuar should be allowed to execute her decree by attaching money in the hands of the receiver, Babu Chandra Sekhar Prasad Singh, who was appointed receiver by the Calcutta High Court. No one has appeared on behalf of the mortgagee-decree-holder and it has been suggested that we should make no order without issuing a further notice to her. It appears to us that it is unnecessary to issue any further notice to her. The question whether the mortgagee or the holder of the money-decree is entitled to proceed against the property in the hands of the receiver is a matter upon which we express no opinion. We grant formal permission to Mt. Mulka Rani Kuar to execute her decree by attaching money in the hands of the receiver."

Having obtained that order Mulka Rani Kuar in execution of her decree [which I should have mentioned was obtained in the Court of the Subordinate Judge (second Court), Chapra] applied for attachment of Rs. 28,000 in the hands of the receiver. It is said, and we may assume for the present purpose, that the attachment was regularly carried out. Mt. Mulka Rani Kuar then applied to the Subordinate Judge (second Court) for an order upon the receiver to pay the sum of Rs. 28,000 to

her and an order for payment was issued. This is one of the orders and indeed the principal order of the Subordinate Judge which the applicant asks us to set aside. She contends that the Subordinate Judge (second Court), Chapra, had no jurisdiction to order payment of the money in the hands of the receiver to respondent 3. Her case is that she is mortgagee of the rents and profits of the property and she is entitled to those rents and profits as against any one holding a money-decree against the judgement-debtor. These conflicting claims to a portion of the money in the hands of the receiver must be decided by some Court and the question is by which Court the dispute should be decided. It appears to me quite clear that the Subordinate Judge (second Court) had no power to decide this dispute. O. 21, R. 52, lays down the procedure to be followed where the property to be attached is in the custody of a Court.

In the present case the money to be attached must be regarded as being in the custody of the Court, as the receiver is admittedly an officer of the Court. Then the proviso lays down that where such property is in the custody of the Court, any question of title or priority arising between the decree-holder and any other person not being a judgement-debtor claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such Court. This proviso appears to apply exactly to the facts of the present case and, in my opinion, the Court to decide the present dispute between the mortgage and the holder of the money-decree is the Court in whose custody the money is, and not the Court of the Subordinate Judge (second Court), Chapra. I am unable to follow the decision in *Gopee Nath Acharje v. Achcha Bibee* (1). I hold that the order passed by the Subordinate Judge (second Court), Chapra, directing payment of Rs. 28,000 odd to respondent 3 was made without jurisdiction and it must be set aside. The applicant, besides asking this Court to set aside the order of the Subordinate Judge (second Court) for the payment of this money, asks us to decide that she is entitled to the money; in other words, she asks this

Court to decide the dispute between the parties.

The learned vakil for respondent 3 contends that his client is entitled to take away the sum which she has attached and that the mortgagee can have no claim to it. In my opinion we should go no further on the present occasion than to set aside the order of the Subordinate Judge (second Court), Chapra. If the parties consider that this Court is the Court to decide the dispute between them a proper application should be made by one or other of them to this Court. At the present moment we have not before us the necessary materials on which to decide the question. Even the mortgage-deed is not here. In conclusion I wish it to be clearly understood that I do not hold that this Court should decide the question. It appears to me, as at present advised, extremely doubtful whether respondent 1, the receiver appointed by the Calcutta High Court, should be treated as a receiver appointed by that Court and not by the Subordinate Judge. I would allow the present application with costs and set aside the order of the Subordinate Judge directing the payment of the sum in question to respondent 3. Hearing fee five gold mohurs. The receiver must await further orders before paying the money.

Sharfudin, J.—I agree.

V.S./R.K.

Order set aside.

A. I. R. 1916 Patna 323

CHAPMAN AND ATKINSON, JJ.

Rajab Ali—Defendant—Appellant.

v.

Wazir Ali—Plaintiff—Respondent.

Second Appeal No. 473 of 1914, Decided on 26th April 1916.

Mahomedan Law — Guardian — Mother — Mother is not natural guardian — Alienation by her — Without sanction is invalid — Art. 44 of Act 9 of 1908 does not apply — Limitation Act (9 of 1908), Art. 44.

Under Mahomedan law the mother is not the natural guardian of her minor sons. Therefore in the absence of an order of Court appointing her their guardian she cannot alienate their property; if she does, the alienation is void and Art. 44, Sch. 1, Lim. Act, will not operate to defeat the son's rights to dispose of their interest in the property : 34 All 213 (PC), *Rel on.*

[P 323 C 2]

Khurshed Hasnain—for Appellant.

Mustafa Khan—for Respondent.

Atkinson, J. — This is an action for a declaration of title by the plaintiff to the extent of a seven-annasshare in two houses and for possession ; and he bases his title on a document, dated 5th January 1912, made by defendant 3 to him. The plaintiff's claim for possession is met by the contention that defendant 1 had purchased the same interest in these two houses from the guardian of defendant 3. Defendant 3, when his father died, was a minor, and he was a Mahomedan. He and his brother lived with their mother, and the mother purported in 1902-07 to dispose of the minors' interest in these two houses. The mother was not the duly appointed guardian of the minors and according to strict Mahomedan law, she is not the natural guardian of her children, and the question arises now whether or not the mother could validly assign and dispose of the minors' interests in this property as she purported to do by the deeds of 1902-07. In our opinion the mother not being the duly authorized guardian of the minors, and the Judge having found that the sale of these houses was not for the benefit or advantage of the minors, the sale or sales made by her to defendant 1 were void and that Art. 44, Sch. 1, Lim. Act, does not operate to defeat the right of defendant 3 to sell and dispose of his interest in these houses to the plaintiff. Accordingly in our view, on the authority of the case decided by the Privy Council reported as *Mata Din v. Ahmad Ali* (1), we are of opinion that the conveyances made by the widow were void and the Statute of Limitation does not apply to this particular case. The learned District Judge having found as a fact that the deed which passed from defendant 3 to the plaintiff, dated 5th January 1912, was a deed for valuable consideration and that consideration did in fact pass, we consider his decree was right, and that this appeal must be dismissed with costs.

Chapman, J.—I agree.

V.S./R.K.

Appeal dismissed.

1. (1912) 34 All 213=15 O C 49=13 I C 976=39 I A 49 (PC).

A. I. R. 1916 Patna 324

MULLICK, J.

Biswambhar Lal—Defendant—Appellant.

v.

Jhulan Ram Tewari and others — Plaintiffs—Respondents.

Second Appeal No. 241 of 1913, Decided on 16th May 1916.

(a) Mortgage—Puisne mortgage in possession under his mortgage decree—Subsequent decree by prior mortgagee and purchase in execution sale, without impleading puisne mortgagee—Suit for ejectment of puisne mortgagee—Puisne mortgagee could not be ejected, if willing to redeem—Art. 144 applies and not Arts. 137 and 138—Limitation Act (9 of 1908), Sch. 1, Arts. 137, 138 and 144.

A property which was subject to two several mortgages, the first usufructuary and the second simple, was purchased by the puisne mortgagee in execution of a decree for sale obtained by him in January 1898. The prior mortgagee sued on his mortgage without impleading the puisne mortgagee, brought the property to sale in 1898, and got symbolical possession on 2nd August 1901. The sale was confirmed on 31st August 1901. He sued to eject the puisne mortgagee on 20th February 1911 :

Held: (1) that the plaintiff could not eject the defendant if the latter was willing to redeem : 32 Cal 891, *Ref.*

(2) that Art. 144, Lim. Act, applied to the suit and not Art. 137 or Art. 138. [P 324 C 2]

(b) Limitation Act (1908), Sch. 1, Arts. 137 and 138—Applicability.

Articles 137 and 138, Lim. Act, do not apply where possession has already been delivered by Court. [P 324 C 2]

Muhammad Mustafa Khan—for Appellant.

Harnandan Sahay and Mritunjoy Lal for Deputy Registrar—for Respondents.

Judgment.—The plaintiffs took an usufructuary mortgage of a 6 pies share from the defendants on 20th September 1882, the sum borrowed being payable on 24th September 1885. The defendants took a simple mortgage of 10 annas of the same village on 23rd June 1893 and in execution got possession of 7 annas in January 1898 and of the remaining 3 annas in 1899. The plaintiffs sued upon their mortgage in 1894, brought the property to sale in 1898 and got symbolical possession on 2nd August 1901. The sale was confirmed on 31st August 1901. Finding the defendants in possession the plaintiffs brought the present suit on 20th February 1911 for recovery of possession. Defendant 1 contested the suit. A number of minor defendants who are the heirs of defendant 12, who is alleged to have been a purchaser of a part of the

Mauza from defendant 1, are represented before me by the Deputy Registrar, but they did not appear in the lower Courts and the learned vakil representing them says that he is not interested in the result of this appeal, because no reliefs have been claimed against him. Both the lower Courts have decreed the suit and hence this second appeal by defendant 1.

The sole contention of the learned vakil for the appellant is that the suit is barred either under Art. 137 or Art. 138, Lim. Act. It is contended that the plaintiffs' decree was a money-decree under S. 68, T. P. Act, that all that he purchased at the sale of 30th August 1898, was the equity of redemption, and that as he was not a party to the puisne mortgagee's suit, he is only entitled to redeem the latter. It is contended that in any event the learned Munsif's decree directing that the puisne mortgagees may redeem the plaintiff on payment of Rs. 1,260 with interest is wrong. Now it appears that the plaintiffs' decree was a decree for sale under S. 67, T. P. Act. The *zarpeshgi* was a mortgage and the mortgaged properties were security for the payment of the consideration. The plaintiffs' decree was a mortgage decree and what he purchased was the 6 pies share in the property subject to the charge of defendant 1 whom he did not implead in his suit. But defendant 1 has already been in possession since 1898. The plaintiffs are not entitled to eject him from the land, if he is willing to redeem: *Har Pershad Lal v. Dalmardan Singh* (1).

On the point of limitation also I think the Courts below have applied the correct article, namely, Art. 144. The plaintiffs are entitled to 12 years from 31st August 1901 on which date they discovered the adverse possession of the defendant. Art. 138 cannot possibly apply because that article relates only to a disturbance of possession by the judgment-debtor. In the present case the plaintiffs' possession was resisted by 3rd party. Moreover Arts. 137 and 138 do not apply where possession has already been delivered by Court.

I think upon the authorities the plaintiffs are entitled to possession, but that defendant 1 has a right to redeem. The learned vakil for the appellants con-

tends that he ought not to be compelled to redeem for Rs. 1,260, but should only pay Rs. 1,000, which was the principal of the plaintiffs' zarpeshgi. It appears however that the amount of Rs. 1,260 was arrived at on compromise in plaintiffs' mortgage suit and that upon the bond the amount to which he was entitled was much greater. So the decree made by the Munsif in the present suit is to the advantage of the defendant. Calculating upon the bond he would have to pay a much larger sum. No other points have been argued and the result is that the appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 325

CHAMIER, C. J. AND JWALA PRASAD, J.
Babu Lal Beladar—Plaintiff—Appellant.

v.

Jadunath Jha and others—Defendants—Respondents.

Second Appeal No. 3615 of 1913, Decided on 24th March 1916.

(a) **Deed—Material alteration — Addition of name as executant who has not signed is not alteration.**

Per *Jwala Prasad, J.*—The mere addition of the name of one of the executants of a document, who did not sign it, is not a material alteration which renders the document void. [P 326 C 1]

(b) **Deed—Alteration—Claim not based on such document—It is used to prove pre-existing debt—Decree can be granted.**

Where a money suit is not based upon a materially altered document and the document is produced only as evidence of a pre-existing debt, the claim shall succeed. [P 326 C 1]

Susil Madhab Mullik—for Appellant.

Baldeo Narain Sinha—for Respondents.

Jwala Prasad, J.—This is an appeal from the decision of the District Judge of Darbhanga dated 16th August 1913, reversing the decision of the Munsif of Madhubani dated 10th May 1913. The plaintiff-appellant brought a suit against the defendants Manik Beladar and Gaina Beladar, two brothers, for recovery of Rs. 365-2-0, principal, with interest at the rate of Rs. 2 per mensem, as per account given in the plaint. The suit was based on an on-demand chiti, dated 1st Kartic 1317 Fasli. It was also alleged in the plaint that the two defendants are full brothers and are members of the same family, joint in mess and business, and that they were jointly benefited by the money borrowed and hence both of

them were made defendants. In para. 6 of the plaint it was further alleged that the two brothers defendants in the case had executed an on-demand chiti dated 1st Asvin 1313 Fasli. The defendants filed joint written statements denying their liability and impugning the hand-notes in the suit as forged and fabricated.

It was further alleged that defendant 2 was separate from defendant 1 in mess and in business from a long time and hence he was not liable in any way for the claim of the plaintiff. In order to prove his claim the plaintiff filed in evidence the first hand-note of 1313 Fasli for Rs. 181-8-0, which purported to have been executed by both the brothers. He also filed another hand-note of 1st Bhado 1315 Fasli executed by Manik Beladar alone for the payment of Rs. 267 due on the first hand-note plus Rs. 18-1-0 advanced in cash. The hand-note in the suit of 1317 Fasli was executed by Manik Beladar alone. The first Court on the evidence in the case held that Manik Beladar, the respondent, borrowed the money and executed the successive hand-notes. It further held that defendant 2 Gaina Beladar did not execute the first hand-note and was not present at the time of the execution thereof, nor was he benefited by the loan and hence was not liable for the claim of the plaintiff. The first Court decreed the entire claim of the plaintiff against Manik Beladar who had executed the hand-note of 1317 Fasli in suit. Manik Beladar, the respondent in this case, took the case in appeal to the District Judge of Darbhanga, who, while not disagreeing with the first Court on the finding of the fact, held that the plaintiff could not succeed in the case as the first hand-note of 1313 Fasli was not proved to have been executed by him, or that he was present at the time of the execution of the said hand-note as held by the first Court. This, the learned District Judge held, was a finding which amounted to an avoidance of the hand-note of Fasli 1313 and that as the consideration for the other two hand-notes was this original debt, the plaintiff's claim must fail as against Manik Beladar also. He further held that by the addition of Gaina Beladar's name, the plaintiff attempted to bind the joint family property without authority and the District Judge

could not see how the plaintiff could come into Court with a document like this and rest any claim upon it.

The learned District Judge went on to observe that this document of 1313 Fasli could not support any contract and consequently the subsequent hand-notes must be taken to have been executed without consideration. Relying upon the ruling in the case of *Gogun Chunder Ghose v. Dhuronidhar Mundul* (1) the learned District Judge dismissed the case of the plaintiff. The plaintiff therefore has come to this Court against the decision of the learned District Judge. It may be taken as a concurrent finding of both the Courts that upon the evidence adduced by the plaintiff the consideration of the hand-note of 1317 Fasli in suit was proved to have been paid by the plaintiff to the respondent Manik Beladar and that the hand-note in suit of 1317 Fasli was duly executed by him. It is not the case of the respondent that there was any alteration in the hand-note in suit. It is said that the addition of Gaina Beladar's name in the hand-note of 1313 Fasli amounted to a material alteration in the instrument and hence vitiated the document altogether. In the first place, there is no alteration at all in the document. The mere addition of the name of one of the executants in the document who did not sign is no alteration within the meaning of the authorities on the subject. Even if it was a material alteration in the document it will be no reason to dismiss the case of the plaintiff in this case, for the simple reason that the suit is not at all based upon the hand-note of 1313 Fasli and the claim of the plaintiff never rested upon it as the learned District Judge seems to have thought. The hand-note of 1313 Fasli was only tendered in this case as evidence of a pre-existing debt. No doubt the salutary rule of English law enunciated in *Piggott's* case (2) and as applied to India in a catena of cases is that a material alteration of a document by a party to it after its execution without consent of the other party renders it void. But in no case either in England or in India has this principle been applied to documents which are only evidence of the defendant's pre-existing liability, and not the

foundation of the plaintiff's claim: *Atma-ram v. Umedram* (3). Even if the hand-note of 1313 Fasli can be avoided on account of an alteration in it, there is no reason why the plaintiff should not succeed in the case if he has proved that the money was advanced to him and that the hand-note of 1317 Fasli, the basis of the claim, was executed by Manik Beladar. I therefore hold that the plaintiff has proved his case and that the suit should have been decreed. I would allow the appeal with costs.

Chamier, C. J.—I agree. It appears to me that in the present case there is no question at all of any alteration having been made in a document. What appears to have happened is that it was originally proposed that two men should sign a hand-note; one signed it and the other did not. Subsequently the note was renewed by the man who signed it and yet again the note was renewed by the man who signed. The man who did not sign the first note had nothing whatever to do with the transaction from first to last and of course, cannot be held responsible. I can discover no reason whatever why a decree should not be passed against the man who did sign all three notes. The order of the Court is that the appeal is allowed. The decree of the lower appellate Court is set aside and the decree of the first Court is restored with costs here and in the lower appellate Court.

V.S./R.K.

Appeal allowed.

3. (1901) 25 Bom 616.

A. I. R. 1916 Patna 326

ATKINSON AND JWALA PRASAD, JJ.

Bishun Perkash Narain Singh and another—Defendants—Appellants.

v.

Muhammad Sadique and another—Plaintiffs—Respondents.

Second Appeal No. 2419 of 1915, Decided on 6th July 1916.

(a) Limitation Act (1908), S. 20—Entry of payment—Signature of party necessary to save limitation.

In order to save limitation under S. 20, Limitation Act, the person who made the payment should be the person who should sign the writing as evidence of payment : 23 Cal 546 (F B), *Appl.* [P 327 C 2]

(b) Contract Act (1872), Ss. 60 and 61—Appropriation of payment—Neither party appropriating—Court entitled to order for

1. (1881) 7 Cal 616.

2. 9 Rep Ch. 266.

appropriation in discharge of debts in order of time.

If the debtor does not appropriate payments of debt, then the creditor may appropriate such payments to any particular debt or to any particular portion of a running account. But if neither party appropriates, the Court is entitled under S. 61, Contract Act, to declare that such payment shall be appropriated in discharge of the debts in order of time : *Cory Brothers & Co., Ltd. v. Owners of the Turkish Steamship "Macca"*, (1897) AC 286, Ref. [P 327 C 2; P 323 C 1]

Harnarain Prasad—for Appellants.

Fakhruddin, Krishna Sahay, Amir Hussian and Baidya Nath Narain Singh—for respondents.

Atkinson, J.—This action is brought by the plaintiff to recover a sum of money alleged to be due for the payment of goods sold by the plaintiff to the defendants between the years 1908 and January 1914. The defendant filed a written statement, but never appeared before the Court of the Subordinate Judge. A decree was passed against him *ex parte*. On appeal at the instance of the defendant, he raised for the first time the question of the Statute of Limitation. He had not, in his written statement, expressly pleaded that the action in whole or in part was barred by limitation, although one might imply from the words used in the written statement an expression of intention to show that the debt was barred. But the Statute was not expressly pleaded. On appeal he expressly raised the question of limitation, and the Judge decided the case on that basis.

Now the facts are very shortly as follows : The plaintiff sold goods to the defendant, and on foot of the account for the goods sold payments were made from time to time by the defendant. When the payments were made, there was no expression of intention as to what particular part of the account or item of the account the payment so made was to be added or appropriated to. The payments that were made on account vary in amounts through different years; in February 1909 Rs. 20, on 21st March 1910 Rs. 200, on 25th November 1910 Rs. 1,000, and so on. During the subsequent period from March 1911 to January 1914, Rs. 2,115 in all were paid by various part payments on foot of the general account.

The appellant's first point is, that under the provisions of S. 20, Limitation Act, these part payments cannot be re-

lied upon to take the case out of the operation of the Statute of Limitation, and that thus the debt due as calculated on 4th March 1911 would have been barred before the institution of this suit, which was instituted on 4th March 1914. And the defendant says :

"Although I made payments, I am not bound, because it is not shown that the person who made the payments wrote in his own handwriting the acknowledgment of the payment so made by him, within the proviso of S. 20 in the Limitation Act."

The facts appear to be, as stated in the uncontradicted evidence of the plaintiff, that the defendant made the payments alleged from time to time and that the entries of the payments that are in writing in the books of the plaintiff were made by the defendant's agent or mukhtear, and are in his handwriting. But it does not appear to be consistent with the evidence that the payment that was made was by the person who made the entry in the plaintiff's ledger. It is quite clear that the Statute requires that the person who made the payment should be the person who should sign the writing as evidence of the payment. We think that the law laid down in the Full Bench case reported as *Mukhi Haji Rahmutulla v. Coverji Bhuja* (1) correctly interprets the legal construction to be given to S. 20. Thus, in this case we are satisfied that there was no writing by the person who made the payment, that is, by the defendant in this case, to satisfy the requirements of S. 20. In that aspect of the case the debt due on 4th March would apparently be Statute barred. Mr. Fakhruddin, on behalf of the plaintiff, urges that his client has a right, under S. 60, Contract Act, to appropriate the payments that were made to the earlier debts, even though those debts might be Statute barred. I think when you come to read Ss. 60 and 61, Contract Act, a very simple Code of Procedure is provided for, analogous in all particulars to the law of appropriation that prevails in England. If the debtor does not appropriate, and he has the first right, then the creditor may appropriate, and he may appropriate to any particular debt or to any particular portion of a running account. But if neither party appropriates, S. 61 is an enabling section, which entitles the

1. (1896) 23 Cal 546 (F B).

Court to declare that such payments shall be appropriated in discharge of the debts in order of time.

I only refer to the case of *Cory Brothers & Co., Ltd. v. Owners of the Turkish Steamship "Mecca"* (2), for the purpose of showing that the law there laid down is in conformity in every respect with the enactments contained in Ss. 60 and 61, Contract Act. Here in this case, there was undoubtedly a running account; payments were made extending over the entire period of that account from its inception to its end; and the question that arises now is, where neither party had made an express appropriation, whether we are to imply that the payments made shall be applied in discharge in the order of date in which the debts were contracted. We think that the plaintiff is so entitled, and I desire to refer to the case of *Hooper v. Keay* (3), to the decision of Blackburn, J., where he says :

"The general rule is, that the party who pays the money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party which receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In the present case the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole; consequently the subsequent payments of £10 and £28, which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit side of the account in order of date; and it follows that the whole of Draper's debt is paid off, and he is entitled to keep his verdict on the plea of payment."

Now, in this case, we think that the argument put forward for the plaintiff is right, there having been no express appropriation, all the payments that were made are to be applied in the order in which the debts were contracted. S. 51 directly supports that view. Accordingly in the view we take we shall reverse the decision of the learned Judge. We allow the appeal and vary the judgment, and allow the plaintiff to

have judgment for the sum of Rupees 2,820 without interest. The respondents are entitled to the costs of this appeal and to their costs in all the Courts below.

Jwala Prasad, J.—I entirely concur with my learned brother both in point of law and facts. The plaintiff is entitled to the price of the goods supplied to the defendant from March 1911 to the date of the suit. The payments made by the defendant during this period shall, under S. 61, Contract Act, be appropriated towards the discharge of the debts antecedent to March 1911. The balance of any debt that may be due to the plaintiff prior to March 1911 is barred by limitation and is not saved by part payments from time to time of the debt, as the entries thereof are not in the handwriting of the person who made the payments, as required by the proviso to S. 20, Limitation Act.

V.S./R.K.

Decree modified.

A. I. R. 1916 Patna 328

MULLICK, J.

Raja Ram Sahu and another—Plaintiffs—Appellants.

v.

Jhanti Gope and others—Defendants—Respondents.

Second Appeal No. 2371 of 1914, Decided on 17th April 1916.

Bengal Tenancy Act (8 of 1885) Scope—It applies to purchase of occupancy by landlord before 1908—Purchase by co-sharer on behalf of others—Effect—Tenancy merges—It is otherwise if purchased for self.

The purchase by a landlord of an occupancy holding prior to 1908 is governed by the Bengal Tenancy Act 8 of 1885. [P 329 C 1].

If the purchase was made by a co-sharer landlord on behalf of the other sharers, the whole tenancy is merged and the purchasing landlord cannot be heard to say that the non-occupancy right still subsists. In the case, however, of a purchase by a co-sharer landlord individually, the non-occupancy right can be kept alive by the purchaser: 3 C. W. N. 62, *Foll.*; 24 Cal. 521, *Expl.* [P 329 C 2].

Naresh Chandra Sinha—for Appellants.

Laxmi Narayan Sinha—for Respondents.

Judgment.—In the Record of Rights the land in suit has been entered as the holding of one Munshi, and the first party defendants have been entered as under-raiyats. Plaintiffs are purchasers in execution of a decree against Munshi and sue, after service of notice, for eject -

2. (1897) A C 286=66 L J P 86=76 L T 579.

3. (1875) Q B D 178=34 L T 574.

ment under S. 49, Ben. Ten. Act. The lower appellate Court has held that the first party defendants are not under-raiyats, but occupancy raiyats, having been in possession of the land as such since 1888 when they obtained a settlement from Sanath Chowdhury, the proprietor, by a registered kabuliyat. The present second appeal has been made by the plaintiffs because their suit has been dismissed.

The learned Judge's finding that the defendants have been in possession as raiyats under the landlord rebuts the presumption of the correctness of the Record of Rights and, therefore, the onus is shifted upon the plaintiffs to show that they have a title superior to that of the defendants. Now, the plaintiffs rely upon the title of Munshi and alleges that Munshi was a co-sharer landlord and that he purchased the occupancy right of the original tenant Phatka Chamar. They contend that although by Munshi's purchase the occupancy right was merged, the non-occupancy right continued to subsist under S. 22 (2) of Act 8 of 1885, which was the law applicable to the present case, and that, although under the present law, which amended Act 8 of 1885 in 1908, the learned District Judge's decision would be right, under the law as it stood at the time of Munshi's alleged purchase the learned Judge's decision is wrong. I think it is clear that the Tenancy Act as it stood before 1908 must be applied to the present case. But before the plaintiffs can succeed they must show that Munshi's purchase was previous to 1888, in view of the finding of the learned District Judge that the defendants have been tenants paying rent to Sanath Chowdhury since that date. The learned District Judge does not record any finding as to the date of Munshi's purchase. He does not even find whether the purchase was actually made, and it would seem that, as the purchase was admitted to have been made by a registered kabala, oral evidence of the purchase is not admissible. The kabala itself has not been produced and no reason has been assigned for the admission of secondary evidence.

Upon the findings, I must take it that the fact of the purchase has not been proved; much less has it been proved that the purchase, if made at all, was in

Munshi's capacity as co-sharer. Clearly, if the purchase was made on behalf of all the landlords, the whole tenancy merged even under the Act as it stood before 1908. The learned Vakil for the appellants relies upon S. 22 (1) of Act 8 of 1885 and contends that upon the language of that section, the entire body of the landlords were competent to keep alive the non-occupancy right in Phatka's holding. He relies upon the case of *Miajan v. Minnat Ali* (1). But the decision in that case did not rest upon the interpretation which the learned Vakil now desires to give to S. 22 (1). Although the Judges there expressed an opinion that the non-occupancy right would continue to subsist, they held that it was not necessary to decide that point, because the plaintiff in the suit before them might be considered to have derived his title from the landlord by the creation of a new tenancy by fresh settlement. They thought that the landlord was competent either to dispose of the old holding under its old name or to create a new holding. On the other hand a later case, namely, *Ram Saran v. Mahomed Latif* (2), is clear authority for the proposition that where a landlord purchases an occupancy holding and gives a lease in respect of it to another tenant, he brings the whole tenancy to a termination and cannot be heard to say that the non-occupancy right still subsists.

The learned Vakil for the appellants has not been able to show me any authority in support of his present proposition. All the cases which he can cite relate only to the purchase of an occupancy holding by a co-sharer landlord, in respect of which it is settled law that under the old Tenancy Act the non-occupancy right would be kept alive by the co-sharer landlord purchaser. In the present case the learned vakil admits that he is not able to prove that Munshi's purchase was on behalf of himself only. Again, if Munshi's purchase was after 1888 then admittedly the plaintiffs cannot possibly succeed. The result, therefore, is that although the learned District Judge's view of the law applicable to this case is incorrect the decree made by him must be affirmed. The plaintiffs have not been able to show that they had

1. (1897) 21 Cal 521.

2. (1899) 3 C W N 62.

under the law as it stood before 1908 a title better than that of the defendants. The result is that the appeal is dismissed with costs,

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 330 (1)

MULLICK AND KINGSFORD, JJ.

Dasarath Sahu and others—Appellants.

v.

Secy. of State—Respondent.

First Appeal No. 210 of 1914, Decided on 30th May 1916, from decision of Dist. Judge, Patna, D/- 19th March 1914.

Land Acquisition Act (1 of 1894), S. 3 (a) —“Land” — Meaning of — Acquisition of things attached to land without land itself not contemplated by Act.

Though the term “land” in S. 3 (a), Land Acquisition Act, is defined as including things attached to the earth, the Act, does not contemplate the acquisition of things attached to the land without the land itself. It is only the land including the rights which arise out of it, and not merely some subsidiary right, which is capable of acquisition under the Act: 35 Cal 525, Ref. [P 330 C 2]

Pugh and K. P. Jayaswal—for Appellants.

Deputy Government Advocate—for Respondent.

Kingsford, J.—This is an appeal from the order of the District Judge confirming the award of the Deputy Collector upon a reference at the instance of the appellants under the Land Acquisition Act. The subject-matter of the acquisition consisted of two houses situated upon plots of land admittedly appertaining to the Bankipore Jail, and the property of the Secretary of State. The contention of the appellants was, that they had a permanent interest in the lands. The case for Government was, that the appellants were mere tenants-at-will, and that they were liable to eviction upon payment of compensation for the houses. The Secretary of State accordingly sued to eject the appellants from the holdings, but in view of the acquisition proceedings he allowed the suit to be dismissed for default. The Deputy Collector thereupon acquired the houses but not the lands. Before the District Judge the appellants contended that they were entitled to compensation for the land. They also objected to the amount of compensation awarded for the buildings. Mr. Pugh, who appears for the appellants before us, has not pressed

the question of valuation of the buildings, but he contends that, as the appellants claim a permanent interest in the land, the Deputy Collector ought to have acquired it, leaving the question of apportionment as between the parties to be decided by a subsequent reference under the provisions of S. 30 of the Act.

The proceedings appear to have been misconceived from the outset. No doubt the definition in S. 3 (a) of the Act includes in the word “land” things attached to the earth, but the Act does not contemplate the acquisition of things attached to the land without the land itself. The law upon this point has been clearly laid down in *Shyam Chunder Mardraj v. Secy. of State* (1), where it was held that Government could not use the Land Acquisition Act for the purpose of acquiring fishery rights over land which was already the property of Government. It was pointed out that it is only the land including the rights which arise out of it, and not merely some subsidiary right, which is capable of acquisition under the Act. The proceedings were therefore without jurisdiction, and the appeal is incompetent and is dismissed, each party bearing his own costs.

Mullick, J.—I agree.

V.S./R.K.

Appeal dismissed.

1. (1908) 35 Cal 525.

A I. R. 1916 Patna 330 (2)

MULLICK, J.

Biseswar Singh—Defendant — Appellant.

v.

Parbhoo Nath Pathuk and another—Plaintiffs—Respondents.

Second Appeal No. 2045 of 1914, Decided on 25th April 1916.

Bengal Tenancy Act (8 of 1885), S. 103—Entry in Record of Rights presumption of occupancy—Landlord must prove contrary.

An entry in the Record of Rights showing a person to be an occupancy tenant creates a presumption in favour of such person, and the onus is on the landlord to establish the contrary. [P 331 C 1]

Chander Sekhar Persad Singh — for Appellant.

Judgment.—The plaintiff is the landlord; defendant 1 is the tenant and defendants 2 to 10 are plaintiff's co-sharer landlords. In his plaint the plaintiff alleged that the lands in suit had been entered in Patti No. 1037 and

that defendant 1 had been entered as an occupancy raiyat. The plaintiff complains that this entry as to the status of the defendant is wrong, that defendant is a trespasser and that the Record of Rights is incorrect. He asks for a declaration of title and recovery of possession. Defendant 1 contends that the lands have been recorded in Patti No. 1038 and that the plaintiff has no title thereto. The Munsif appears to have been at great pains to determine whether or not the lands were in Patti No. 1037 or No. 1038, but I am unable to understand why he went into this matter seeing that the Record of Rights itself shows the lands to be in No. 1037. It was for the defendant if he challenged that to prove it to be incorrect, but the learned Munsif appears to have thought that the onus was upon the plaintiff to show that the Record of Rights was incorrect. Possibly the learned Munsif was under the impression that the Record of Rights showed the lands to be in No. 1038; if so, that was an inexcusable error on his part, because a moment's perusal would have satisfied him that the lands were entered in No. 1037. Finding that the lands had not been shown to be in No. 1037 the Munsif dismissed the suit.

On appeal the learned Subordinate Judge has correctly thrown the onus upon the defendant in the matter, as to whether the lands are or are not within No. 1037. He finds that the defendant has not discharged that onus and he accordingly finds the plaintiff's title as landlord established. But the learned Subordinate Judge has gone wrong in throwing the onus upon the defendant in the matter of the entry which shows him to be a tenant under the plaintiff. He says that it is for the defendant to show that he is a tenant. This clearly cannot be correct, because the Record of Rights creates a presumption in the defendant's favour which it is for the plaintiff to rebut. If therefore it had been shown that this error in placing the onus has vitiated the finding of the Subordinate Judge as to the defendant's status I would have remanded the appeal; but the subsequent part of the learned Subordinate Judge's judgment makes it clear that the question of onus is purely academical and that the error in placing the burden has not in any

way vitiated his finding. He says that he believes the plaintiff's evidence to the effect that the defendants are not tenants and that the defendants have not been able to show that they are tenants. That is to say, the learned Subordinate Judge upon a consideration of the evidence on both sides has come to the conclusion that the defendant's claim of tenancy has not been proved and that the plaintiff by his evidence has been able to rebut the presumption created in the defendant's favour by the Record of Rights. That being so, I consider it unnecessary to remand the case. The appeal will therefore be dismissed with costs.

This judgment will govern Appeal No. 3692 of 1914 which also is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 331

ROE, J.

Mt. Gunjra Koer—Plaintiff — Appellant.

v.

Mt. Lakhan Koer and another—Defendants—Respondents.

Civil Misc. Appeals Nos. 520 and 521 of 1915, Decided on 17th July 1916.

(a) **Civil P. C. (1908), O. 9—O. 9 does not apply to execution proceedings.**

Order 9, Civil P. C., does not apply to proceedings in execution: 17 *All* 106, (P C), *Foll.*

[P 332 C 2]

(b) **Execution—Application—Dismissal for default—Petition for restoration not maintainable.**

Applications for execution should, when struck off, be presented afresh and not revived as in the case of plaints: 41 *Cal* 1, *Foll.*

[P 332 C 2]

(c) **Execution—Application—Dismissal for default—Restoration order is without jurisdiction and is nullity.**

An order restoring an application for execution, which was dismissed for default, is an order passed without jurisdiction and is a nullity.

[P 332 C 2]

(d) **Execution—Limitation — Plea can be raised at any stage.**

An objection as to limitation may be taken at any stage of the execution proceedings, if the facts upon which the objection is based are patent upon the face of the record. [P 332 C 2; P 333 C 1]

Rajendra Prasad—for Appellant.

Khurshed Hussain—for Respondents.

Judgment.—In this case the appellant obtained on 13th March 1911 two decrees for rent against the respondents. These decrees were obtained by the appellant as a co-sharer landlord. The other co-sharers were not brought upon the record. On 10th March 1914, the

appellant made his first application for execution. The application was registered on 13th June 1914. It was dismissed for default of 6th November 1914. On 3rd December 1914, the appellant applied under O. 9, R. 4, for the restoration of the applications to the file and on 12th December 1914, these applications were granted without notice to the judgment-debtors-respondents. On 24th February 1915, the judgment-debtors put in an objection and the cases were registered as under S. 47, Civil P. C. The objections taken by the judgment-debtors were:

(1) That there had been a grave irregularity in the manner of the valuation of the property attached; (2) That the execution of the decrees was barred by limitation. In the proceedings before the Munsif's Court apparently no argument was addressed to the learned Munsif upon the question of limitation. The learned Munsif dealt only with the question of valuation and upon that made a peremptory orders that the objection of the judgment-debtor was not made in good faith. From that order an appeal was made to the District Court and was disposed of by the Subordinate Judge. He pointed out that the question of valuation should have been treated more seriously by the learned Munsif, but decided the matter upon the question of limitation. He also pointed out that on 13th March 1914, the decree was dead and that unless the application of 3rd December 1914 could be treated as an application in continuation of the application of 10th March 1914, the proceedings in execution were time-barred. Against that order appeals were made to this Court and have been argued upon two grounds only:

Firstly, that the order of 12th December 1914, setting aside the rejection of the application of 10th March 1914, for default may be treated as not void but voidable, inasmuch as the Munsif's Court had jurisdiction at any rate to review its order dismissing the applications for default and the form of that order would be a question of irregularity and not of nullity. Secondly, that inasmuch as no argument was addressed to the Munsif upon the lines taken before the Subordinate Judge, the judgment-debtor must have been held to have waived the irregularity whereby the Munsif's Court

proceeded with the execution of the decree. The points therefore for decision are: Firstly, could the judgment-debtors waive the irregularity committed by the Munsif's Court in re-admitting the application of 10th March 1914 for execution; if so, did they in fact waive that irregularity? Upon both these points the appeal must fail.

Since the decision in *Thakur Prasad v. Fakir Ullah* (1) it is settled law that O. 9 does not apply to proceedings in execution. It is contemplated both by the old Civil Procedure Code and by the new Code that applications for execution should, when struck off, be presented afresh and not revived as would be done in the case of plaints. *Hari Charan Ghosh v. Manmatha Nath Sen* (2) is distinct authority for the proposition that any order passed under O. 9 would be passed without jurisdiction in proceedings taken in execution of a decree. The words of Sir Lawrence Jenkins are: "The learned Munsif had not the jurisdiction which he purported to exercise." Where a Court has no jurisdiction its order may be treated as a nullity. The order of the Munsif of 12th December 1914, continuing these proceedings, must be treated as a nullity. The judgment-debtors could not waive the objection that the restoration of the application of 10th March was void, but they could waive the objection to the petition of 3rd December being taken as a new application for execution not barred by limitation. This, it is suggested, they did. The argument is that as there is nothing in the order of the Munsif dealing with the question of limitation, the judgment-debtors must be held to have waived the question of limitation.

The Munsif peremptorily threw out the objection of the judgment-debtors on the ground that it was made solely to harass the decree-holders. The form of his order would indicate that there was no proper hearing of the objection. It may well be that the pleaders employed in the Munsif's Court had failed to notice that the order of 12th December 1914 was passed without jurisdiction and it may have been that they failed to press the objection properly before the learned Munsif, but it is settled law that objection upon the ground of limi-

1. (1895) 17 All 106=22 I A 44 (P C).

2. AIR 1914 Cal 126=41 Cal 1=19 I C 683.

tation may be taken at any stage of the proceeding if the facts upon which the objection is based are patent upon the face of the record. They are rightly taken and rightly decided in the Court of the learned Subordinate Judge. The orders of 12th December 1914 were made without jurisdiction. There was nothing before the Munsif's Court upon which the application of 3rd December 1914 could be taken as proceedings in continuation of the order of 10th March 1914. Execution was from the date of the striking off of the applications of 10th March 1915 barred by limitation, and all further proceedings must be held void. The appeals are dismissed with costs. Hearing fee one gold mohur in each case.

V.S./R.K.

Appeals dismissed.

A. I. R. 1916 Patna 333

CHAMIER, C. J. AND JWALA PARSAD, J.
Phulchand Lal and others—Plaintiffs
—Appellants.

v.

Karman Singh and others — Defendants—Respondents.

Second Appeal No. 161 of 1913, Decided on 23rd March 1916.

Bengal Tenancy Act (8 of 1885), Ss. 50 and 105—Presumption under S. 50 arises when application under S. 105 is made after final publication of Record of Rights.

Where an application is made under S. 105, Ben. Ten. Act, as amended by Bengal Acts 3 of 1898 and 1 of 1903, for settlement of rent after the final publication of the Record-of-Rights, the tenant is entitled to the benefit of the presumption which may be made under S. 50 of the Act: 37 Cal 30, *Rel on.* [P 334 C 1]

Chandrasekhar Prosad Singh — for Appellants.

Judgment.—This appeal arises out of an application made by the appellant under S. 105, Ben. Ten. Act. In his application he alleged that most of the defendants, 166 in number, were in occupation of land in excess of the area specified in the jamabandi. He asked, for that reason, that the recorded rents might be enhanced and he asked also that a fair and equitable rent might be determined in respect of other lands. The Assistant Settlement Officer after a careful examination of the evidence, both oral and documentary, came to the conclusion that if the evidence justified a presumption under S. 50, Ben. Ten. Act, that the defendants had been holding at a rent or rate of rent which

had not been changed from the time of the permanent settlement, the plaintiff had by his evidence sufficiently rebutted that presumption. The Assistant Settlement Officer discussed a number of other questions, but we have gone straight to the question just referred to because that is the only question before us in this second appeal. An appeal was taken to the Court of the Special Judge against the decision of the Assistant Settlement Officer. It was admitted before the Special Judge that a large number of the appeals could not be sustained and the learned Judge had consequently to deal only with the cases of 42 appellants. He referred to three decrees of 1881 as showing that one of the defendants had held his land in that year at a fixed rate of Re. 1-2-0 per bigha, the rate entered in the settlement record in 1911. The learned Judge pointed out also that the same decrees proved that three other defendants had held their land in 1881 at a fixed rate of Re 1-2-0 per bigha. As regards all the 42 defendants, except the one first mentioned, he pointed out that a batwara khasra of 1263 fasli showed that they had held their land in 1263 fasli at a rate of Re. 1-2-0 per bigha, the rate entered by the settlement officer in the record prepared in 1911. On this evidence the learned Judge came to the conclusion that it was proved that the 42 defendants in question had held at a rate of rent which had not been changed during the 20 years immediately before the institution of the proceedings and, therefore, it should be presumed under S. 50 of the Tenancy Act that they had held at a rate of rent which had not been changed from the time of the permanent settlement. The learned Judge then turned to the evidence produced by the plaintiff, which in the opinion of the Assistant Settlement Officer was sufficient to rebut any presumption that could be made under S. 50 of the Act. He discussed it at length and he disagreed with the Assistant Settlement Officer's view that that evidence satisfactorily rebutted the evidence on which the presumption was made. The learned Judge was of opinion that the evidence produced by the plaintiff was not sufficient to rebut the presumption. He, therefore, allowed the appeal of the 42 defendants.

This is a second appeal against the decision of the Special Judge. A preliminary objection was taken on behalf of the defendants, to the effect that the appeal was barred by S. 109 (a), sub-S. (3), because the decision of the Special Judge was a decision settling rent within the meaning of that provision. In the view which we take of the merits of this appeal, it is unnecessary for us to discuss the question whether or not a second appeal lies in such a case as this. It was contended on behalf of the plaintiff-appellant that no presumption could be made in favour of the defendants under S. 50 of the Tenancy Act because the particulars mentioned in S. 102, Cl. (b) of the Act, have been recorded under Ch. 10 of the Act. The learned counsel relied upon S. 115, which is to the effect that when the particulars mentioned in S. 102, Cl. (b), have been recorded under Ch. 10 in respect of any tenant, the presumption under S. 115, shall not thereafter apply to that tenancy. Secondly, he contended that there was no evidence before the Special Judge that the defendants had held for 20 years before the suit at a fixed rate of rent. Thirdly, he contended that if there was evidence regarding the rate of rent paid by the defendants during the last 20 years, that evidence did not justify the inference or the finding that that rate of rent had been paid uniformly for the required period of 20 years.

The first contention appears to us to be made by the decision of the Full Bench in the case of *Pirthi Chand Lal Chowdhury v. Sheikh Basarat Ali* (1), in which it was held by five Judges that when an application is made under S. 105, Ben. Ten. Act, as amended by Bengal Acts 3 of 1898 and 1 of 1903 for settlement of rent after the final publication of the Record-of-Rights, the tenant is entitled to the benefit of the presumption which may be made under S. 50 of the Act. As regards the second contention it is sufficient to say that there is certainly some evidence as regards the rate of rent paid by the defendants. The evidence has already been set out above. As regards the third contention it is sufficient to say that the question is not whether a correct construction has been placed upon

1. (1910) 37 Cal 30=3 I C 449.

documents, but whether the evidence is sufficient to show that the rate of rent has been uniform for the required period. In the case of some of the defendants it is perfectly clear that there was sufficient evidence to justify the conclusion of the learned Special Judge. It was proved beyond any doubt that they had held in 1855, again in 1881 and again in 1911 at the same rate of rent. It is impossible to hold that such evidence does not justify a presumption under S. 50, Ben. Ten. Act. In the case of other defendants there was perhaps less evidence, but it is important to remember that the appellant, the landlord of the village, did not produce any of the village papers. Those papers would have shown what rent or rate of rent had been paid by the defendants throughout the period in question. In view of the non-production by the appellant of these important papers, it seems to us impossible to say that the learned Special Judge was not entitled to hold on the evidence before him that it was proved that the defendants had been holding their land at a fixed rate of rent. In our opinion the learned Judge was entitled to make the presumption under S. 50 of the Tenancy Act in respect of all the 42 defendants and we certainly cannot interfere with his finding that the evidence produced by the appellant was not sufficient to rebut that presumption. The result is that the appeal fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 334

KINGSFORD, J.

Anant Lal Sahu — Plaintiff—Appellant.

v.

Gokul Sahu and others—Defendants—Respondents.

Second Appeal No. 1977 of 1914, Decided on 27th July 1916.

Civil P. C. (1908), O. 26, R. 9—Local investigation by Court—Result of investigation should be made matter of record—Investigation should enable judge to understand evidence and not for purpose of finding decision.

It is doubtful whether under the provisions of the present Civil Procedure Code it is legal for the Court in person to hold any local investigation. In case the Court holds any local investigation, the result of the investigation should be made a matter of record in order that the party adversely affected by it may have an op-

portunity of meeting it, and further it should be used only for the purpose of enabling the Judge to understand the evidence and not for the purpose of finding his decision thereon: 14 I C 377, Ref [P 335 C 2]

Kulwant Sahai and Abani Bhushan Mukherji—for Appellant.

Fakhr-ud-din and Surendra Mohan Das—for Respondents.

Judgment.—This is an appeal by the plaintiff from an order of the learned District Judge affirming that of the Munsif dismissing the plaintiff's suit. The plaintiff sued to recover possession of two parcels of land, one of which he asserted that he had obtained by exchange from the defendant second party and the second under a settlement from the landlord. The case of defendant 1 was that he had purchased both these plots from defendant 2 in whose holding they were situated. Both the Courts found that the plaintiff had failed to prove the alleged exchange and the alleged settlement. It appears that a local enquiry was made by the Munsif and with the result of that investigation the Munsif has dealt at some length in his judgment. The question of possession was of very considerable importance in the suit and with reference to this question the learned Judge observes as follows:

"The plaintiff's case as to possession generally is discredited by the results of the inspection held by the learned Munsif. It would have been well if the learned Munsif had embodied the result of his inspection in a separate note—still the fact that he has not done so does not deprive his inspection of all utility."

It is contended in appeal by the learned vakil for the plaintiff in this Court, in the first place, that under the provisions of the present Code of Civil Procedure no Court is authorized to hold any local enquiry whatever and the second contention is that the judgments of the lower Courts have been vitiated by the use to which the local enquiry was put. In this connection I am referred to the provisions of O. 26, R. 9, Civil P. C., and to the ruling in the case of *Rai Kishori Ghose v. Kumudini Kanta Ghose* (1). I do not think it is necessary for me to decide the first point put forward by the learned vakil for the plaintiff, but I may observe that the fact that the words "and the same cannot be conveniently conducted by the Judge in person" have been omitted

from the old S. 392, Civil P. C., renders it, at any rate, a matter of some doubt as to whether under the provisions of the present Code it is legal for the Court in person to hold any local investigation. Now as to the second point, I think that there are two principles applicable to a local enquiry. One of these is, that the result of it should be made a matter of record in order that the party adversely effected by it may have an opportunity of meeting it, and the other is that the enquiry should be used only for the purpose of enabling the Judge to understand the evidence, and not for the purpose of finding his decision thereon. Both these principles appear to have been infringed by the learned Munsif. In the first place he has not reduced his inquiry to writing; the inquiry appears to have been made after the case was closed; and as to the manner in which the learned Munsif has used the enquiry which he made, I may refer to certain passages in his judgment.

In the first place, he notes that he could find no "ari" on the land, and from that fact he makes a deduction in favour of the plaintiff's case in which he says there are irreconcilable discrepancies upon this point. Then he says that in his opinion the "nikas" of the plaintiff's house is really on the south and not the east; he also says that he found a shop on the south side of the plaintiff's house and from these facts he deduces that the plaintiff has set up a false reason for his desire to obtain the land. Then he notes that the whole of the disputed land is surrounded by a wall, whereas the plaint was absolutely silent as to the existence of any such wall. Upon this point he has been corrected by the learned Judge. Then he says that he found that the plot had been levelled and he finds that this fact lends greater support to the defendants' case than it does to that of the plaintiff. So it appears that the Munsif, without giving the plaintiff any opportunity of meeting the facts which the Munsif found at the local enquiry, has used these facts to a very large extent in order to impugn the plaintiff's veracity and for the foundation of his decision. In these circumstances I am of opinion that the Munsif's judgment and also that of the learned Judge have been vitiated by the manner in which the local enquiry

1. (1912) 14 I C 377.

was used. I therefore allow the appeal and set aside the orders of both the lower Courts and remand the suit to the Court of the Munsif for re-hearing, after excluding from consideration the results of the local enquiry held by the previous Munsif. Costs of this appeal will abide the result.

v.S./S.K.

Appeal allowed.

A. I. R. 1916 Patna 336

ROE AND JWALA PRASAD, JJ.

Durga Bai—Plaintiff—Appellant.

v.

Sobha Singh and others—Defendants—Respondents.

Second Appeal No. 4174 of 1913, Decided on 23rd May 1916, from decision of J. C., Chota Nagpur, D/- 17th June 1913.

(a) **Hindu Law — Joint family—Grant—Ancient grant to a member—Presumption is that it is joint family property.**

An ancient grant made to a member of a joint Hindu family must be presumed to be a grant to the family and not to the individual : 9 W R 558, *Ref.* [P 337 C 2]

(b) **Ejectment—Burden of proof—Plaintiff must prove title—Waiver of third person not binding—Effect—Title cannot be acquired by waiver against stranger.**

In a suit for ejectment the plaintiff must prove his own title. No title can be acquired against third party by a waiver not binding on that party, the more so when such waiver is, to the knowledge of the Court, false. [P 337 C 2]

Plaintiff sued to eject defendant from property which, she alleged, was acquired by her father who was a member of a joint Hindu family:

Held : that it was plaintiff's duty to prove that the property was her father's separate acquisition and the fact that the other members of the family did not contest that position, could not dispense with such proof as against the defendant who was a stranger. [P 337 C 2]

Judgment.—In this case the plaintiff sues to recover possession of property on the ground that it was bequeathed to her by her father by a will, and in the alternative, that title therein vests in her as heiress of her father, who was the last surviving member of a joint family descended from one Bishnath. The Court of the Subordinate Judge and that of the Judicial Commissioner have come to concurrent findings of fact, that the joint family of which her father was a member was not confined to Bishnath and his two sons, but comprised also one Sadasib, who was the brother of Bishnath. They have also found that Sadasib was the last surviving member of that family, and therefore neither as heiress nor as the legatee of her father is the

plaintiff vested with any title to recover any property which was the property of that joint family. Upon the further issue of fact,—was the property in dispute property of that joint family?—the lower Courts have again concurred in the conclusion that the burden of proof was on the plaintiff to show that the property of which she seeks to recover possession was the self-acquired property of Bishnath, and that she has failed to do so.

In second appeal the learned vakil for the appellant concedes that if, indeed, the suit had been fought out upon these lines, these findings of fact would preclude the appeal. He urges however that the written statement was so carelessly drafted as to put the plaintiff upon no notice that this would be the line upon which the suit would be fought, that the issues were not framed upon these lines, and that the case was in this form sprung upon the plaintiff's vakil in his argument before the learned Subordinate Judge. The sole point for our consideration therefore is whether taking the pleadings as a whole and the evidence upon the record as a whole, we are satisfied that the plaintiff realised the nature of the defence that she was required to meet. We are unfortunately not assisted greatly by the evidence upon the record in coming to a conclusion upon this point; for it appears that the suit was instituted so far back as 1907, and that the laches of the plaintiff was so great that her suit was dismissed in the first instance by the Subordinate Judge, and that dismissal was confirmed in appeal by the learned Judicial Commissioner, and came before their Lordships of the Calcutta High Court in Appeal from Appellate Decree No. 2020 of 1908. The order made by their Lordships upon that appeal was that though they would give the plaintiff an opportunity of being heard further in support of her case, she must produce before the Subordinate Judge only those witnesses and documents and those records of commissions which were shown to have been upon the record and named in the *ism-navisi* filed prior to the date upon which the learned Subordinate Judge dismissed the suit.

We have therefore only the plaint, the written statement and the issues upon which to decide whether the plain-

tiff had notice of what was likely to be the nature of the defence. In turning to the plaint we see that the plaintiff herself had at least a suspicion of the lines on which the suit was to be fought; for she admits in para. 3 of the plaint, that Sadashib was in possession of the property after the death of her father and managed that property. She explains that fact by an assertion that he did so only because the plaintiff was in such a state of collapse from grief at the death of her father, that she was incapable of managing the property herself. In the written statement we find that the facts set forth therein are, that Sadashib and Bishnath were together in possession of this property and that Sadashib succeeded to sole enjoyment of it on the death of the sons of Bishnath. It is clear that in the written statement there was a clear indication that it was the defendants' case that the property was not the property of Bishnath alone, but that his brother Sadashib had during Bishnath's lifetime, a half-share in the property, and after the failure of that branch, a 16-annas share in that property. Moreover the fifth issue framed was, did the plaintiff acquire any right by her father's will? That will had already been admitted to Probate in the Court of the District Judge, and it must have been obvious to the legal advisers of the plaintiff that there could be no sense in that issue, save that the defendant contested the plaintiff's title, on the ground that her father, being a member of a joint family, had no right to execute any will. With all these considerations before us, we are satisfied that the plaintiff must have been fully aware of the probable nature of the defence in the shape in which it has been accepted in the Courts of the Subordinate Judge and the Judicial Commissioner.

The only point remaining for decision is, whether the Courts were justified in placing upon the plaintiff the burden of proof, that the property in suit was acquired by Bishnath only. It is conceded that, as between the members of the family, the burden would be upon the plaintiff. But it is urged that, inasmuch as the defendant is a stranger to the suit, this rule would not apply in his case, and that so long as the members of the family were agreed that the

1916 P/43 & 44

property was Bishnath's own property, the defendant should not be allowed to contest the assertion of all the members of the family. It is settled law, that before a plaintiff can succeed in a suit for eviction the plaintiff must prove her own title, and it has been held so frequently that it is unnecessary to quote the authorities for the proposition, that no title can be acquired against a third party by a waiver not binding upon that party and still less can it be acquired by a waiver which to the knowledge of the Court is a false waiver. Clearly the plaintiff, before she can succeed, must prove by evidence, and not merely by waiver by the other members of the family, that she has a title to the property in suit. The evidence upon which it has been decided that Bishnath was not solely interested in this property is the admission made by Sadashib's grandson, Kashi Nath, that there were a large number of *ijmali* properties held by the brothers Bishnath and Sadashib. And we may refer in this connexion to the case of *Badul Singh v. Chutterdharee Singh* (1), that there is a presumption that all ancient grants are made for the benefit of the joint family and not for the benefit of the individual in whose name they stand. We see no reason why presumptions of this nature should hold good as against one set of people and not as against another. We are of opinion that the lower Courts were justified in assuming from the moment that it was found that Sadashib and Bishnath were joint, that a grant of the property now in dispute was made to them jointly, and not to Bishnath alone. In this view of the case the plaintiff had no title upon which she could maintain an action for ejection. The suit was rightly dismissed; the appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

1. (1868) 9 W R 553.

A. I. R. 1916 Patna 337

CHAPMAN AND ATKINSON, JJ.

Lal Gajendra Nath Sahi Deo and others—Plaintiffs—Appellants.

v.

Lal Mathurlal Nath Sahi Deo and others—Defendants—Respondents.

First Appeal No. 99 of 1914, Decided on 16th April 1916, from decision of Sub-Judge, Ranchi, D/- 22-12-1913.

(a) **Impartible Estate — Badla estate in Chota Nagpur District—Custom of primogeniture prevails in all estates granted by Maharaja of Chota Nagpur.**

The Badla estate in the Chota Nagpur District is governed by a custom whereby it descends as an impartible estate to the eldest male heir by lineal descent. This custom prevails in all the estates granted by the Maharaja of Chota Nagpur to his relations. [P 341 C 1]

Where a custom prevails in one branch of a family, it is strong evidence to be relied on that it applies with equal force to another branch of the same family : 23 All 37 (PC), *Foll.*

[P 341 C 1]

(b) **Grant—Construction—"Putra putradi"—Meaning of.**

Per *Atkinson, J.*—The words "putra putradi" used in a grant convey an absolute perpetual estate in the lands descendible from generation to generation coupled with full power of alienation, though these words of limitation may be controlled by custom limiting their scope and operation : AIR 1914 Oudh 255, *Foll.*

[P 341 C 2]

Per *Chapman, J.*—It is quite impossible to say that in 1765, before the arrival of the British jurisdiction in the forests of Chota Nagpur, the words "putra putradi" had acquired a technical significance; the Privy Council decisions dealing with this expression were in respect of wills prior to 1868, by which time the expression acquired a technical significance. [P 344 C 2]

(c) **Custom—Proof—Custom can override or modify general law.**

Custom conclusively proved and established can override or modify the ordinary law.

[P 342 C 1]

S. Sinha and Guru Saran Prasad—for Appellant.

Jogesh Chandra Dey and Muhammad Fakhruddin—for Respondents.

Atkinson, J.—This is an action brought by the plaintiffs for a declaration that they are entitled to an hereditary jagirdari right in one-half of the lands described and forth in Sch. A to the plaint and that possession of the same may be awarded to them coupled with consequential relief. The plaintiffs' claim is based on the assumption that the lands set forth in Sch. A form part of a partible estate and that by virtue of a deed of 8th September 1866, plaintiff 1 is entitled to a half-share of such properties. Defendants 1, 2 and 3 who are really the chief defendants deny that plaintiff 1 or any of the other plaintiffs are entitled to the relief they seek or to the possession of the lands, and the defendants further contend that the lands set out in Sch. A to the plaint are old ancestral properties impartible in character and descendible by the rule of primogeniture according to the custom which prevails in Chota Nagpur; and that by reason

thereof defendant 1, being the eldest male heir in the lineal line of descent, is entitled to possession of all the properties enumerated in Sch. A to the exclusion of plaintiff 1 or plaintiffs 2 to 9. Plaintiff 1 claims a half share of the lands mentioned under the deed of 8th September 1886; and plaintiffs 2 to 9 represent portions of such half share which plaintiff 1 assigned to them for value.

However the main contest is between plaintiff 1 and defendant 1; and the main question for decision in this case is whether the properties set forth in Sch. A form an impartible estate governed by the rules of primogeniture according to the custom prevailing in Chota Nagpur; or, whether the estate is partible as ordinary joint Hindu property governed by the Mitakshara law? The main facts of the case are as follows :

One Kharag Rai, the common ancestor of plaintiff 1 and defendant 1, came to the province of Chota Nagpur about the year 1760. He was a relation of the then Maharaja of Chota Nagpur, and in the year 1765, the Maharaja, by a jagir pattah, granted to him, his sons and grandsons one village, viz., Mauza Bansari and by a subsequent grant of the same kind the said Maharaja granted in the year 1769 to Kharag Rai 13 villages comprised in the Pargannah Pesrar. It will be necessary to notice the family tree in this case. Kharag Rai had two sons, Hari Sahi and Padam Sahi, and in the year 1786 the Maharaja granted one other village to Hari Sahi and Padam Sahi. Hari Sahi was the eldest son of Kharag Rai and Padam Sahi was the second son. Plaintiff 1 and defendant 1 are the descendants of Padam Sahi in the direct line of succession, Hari Sahi's line having become extinguished on the death of his great-great-grandson Baij Nath, who died childless.

Defendant 1 is the eldest male descendant of Gagarnath and plaintiff 1 is the eldest male descendant of Srinath who was Gagarnath's second brother; the father of Gagarnath and Srinath being Lohra Sahi, the great-grandson of Padam Sahi. The properties comprised in the three grants, which I have mentioned from their respective dates have descended without question to the eldest male heirs of the common ancestor, Kharag Rai,

down to the year 1842, a period of 77 years. In Chota Nagpur the custom of primogeniture does prevail in the case of grants made by the Maharaja whereby the property so granted by him is deemed impartible and descends to the eldest male heir by lineal descent. This custom was recognized in the case reported as *Thakur Kopilnauth Sahi Deo v. Government* (1). This custom, which is recognized in the province in respect of grants of land made by the Maharaja, applies with greater force in the case of grants of property made between the Maharaja and his relations. In the report (1902-1910) on the Survey and Settlement of the District of Ranchi, compiled by Mr. J. Reid, I. C. S., a gentleman of high repute and authority, I find this custom to be well established and recognized. At p. 110, para. 253, speaking of the very tenures under which the property in this suit is held, he says as follows :

"Jagir tenures are also impartible ; the law of primogeniture is the rule in the Maharaja's family. The eldest son therefore succeeds to the estate, the younger brothers being entitled only to maintenance grants. This custom has always regulated the succession to landed property among the various jagirdars and other tenure-holders of one of the same family as the chief. Not only is this so, but nearly all the tenure-holders who are not of the same family have adopted the same custom of succession to the exclusion of the ordinary Hindu law of inheritance. The antiquity of the usage is proved by the fact that it was recognized by the legislature as far back as the year 1800."

Again, I find that Col. Dalton in the year 1875 says :

"the ordinary Hindu law does not apply to those estates (jagirs) as by custom and under the provisions of a resolution passed in 1880, primogeniture is admittedly the *lex loci*,"

and on p. 112 of Mr. Reid's report, in para. 256, he summarizes the general custom as to the tenure of all estates held from the Maharaja and says :

"they all follow the law of primogeniture : the eldest son manages the estate and the younger sons obtain khorposh grants. In some cases the latter pay a quit rent to the elder brother, but they continue to hold the khorposh grants even if the estate is transferred by sale or otherwise alienated, but the khorposh grants revert to the estate in default of male heirs. I have found this to be the prevailing custom, and I can find no cases where an estate is divided even though there were three or four brothers in each generation."

This being then the recognized custom of the estate, let us examine the facts of this case for the purpose of seeing how

obediently was this rule of custom followed and obeyed by the plaintiffs' ancestors in their dealings with the property now in question. From 1765 to 1842 all the granted properties passed from Kharag Rai to Hari Sahi, Moni Sahi and Jiban Sahi, each being in turn the eldest male heir in direct line of succession to their common ancestor Kharag Rai. Biju Sahi was the father of Baijnath. Biju died prior to 1842, leaving Baijnath his only surviving legitimate son, a minor, under the guardianship of his mother Mt. Suba Koer. At Biju's death all the granted properties were vested in him, as the holder thereof, save as to such, if any, which were granted to the junior members of the family by way of maintenance, and this was so, even though the grant of one mauza, namely, the village of Kena, was made in the year 1786 to Hari Sahi and Padam Sahi jointly. Lohra Sahi, the great-grandson of Padam Sahi, being the descendant of the second son of Kharag Rai, challenged the right of succession by primogeniture to this estate in the year 1842 as between Mt. Suba Koer, the guardian of Baijnath, and himself.

By an agreement, dated 3rd September 1842, Lohra Sahi abandoned his claim and admitted that the estate was impartible by the custom of the family and descended according to the law of primogeniture and agreed, in lieu of his then alleged claim for partition, to take portions of the several mauzas mentioned in the ekrarnama of 3rd September 1842 by way of a maintenance grant. Lohra Sahi was the great-grandfather of plaintiff 1 and defendant 1, and this admission made by him as to the custom prevailing in the family as to the impartibility of the estate, and its descent by the law of primogeniture, operates strongly, in my opinion, against the plaintiffs' contention that the estate is or was at any time partible. Khedan Rai, the brother of the original ancestor Kharag Rai, also received a six-annas share of the Badla estate as maintenance; each male holder for the time being of the estate as the eldest male acquired also by custom the title of thakur.

This continuity of title began with Hari Sahi and followed uninterruptedly the course of each male heir successively; and defendant 1 now enjoys this title. Lachman Sahi was the illegitimate son

1. (1875-76) 1 Cal 142=22 W R 17.

of Biju Sahi, the father of Baijnath. He also acquired a portion of the property by way of grant for maintenance; and he possibly may have acquired a portion by wrongful possession or adverse title, but this is not clear. He never questioned the custom of descent prevailing in the family and possibly, being an illegitimate son having no rights under the Hindu law, he did not care to do so having nothing to gain thereby. Defendants 6 and 7 are his descendants and they are now in possession of the properties set out in Sch. B to the plaint. These properties really form part of the properties in Sch. A. Baijnath died childless in 1862. It is alleged by the plaintiffs in para. 5 of their plaint that Baijnath's widow, on his death, took an estate of inheritance in all the several mauzas mentioned in Sch. A of the plaintiffs' claim, but defendants 1, 2 and 3, in para. 14 of their written statement, deny that the widow acquired any estate of inheritance on the death of her husband; but as a special case, was allowed to remain in possession of the ancestral property till her death. I find it stated in para. 3, p. 249 of Mr. Reid's book to which I have already referred

"when the estate is resumed in default of male heirs, the invariable custom is to make a khorposh grant to the widow for support during her lifetime."

When Baijnath died there was no failure of male heirs—Gagarnath and Srinath, grandfathers of plaintiff 1 and defendant 1 were alive and in being—and the succession of the family estate, then, in the events that happened, passed to Gagarnath as the eldest male heir; and thus it appears clear that there was no failure of male heirs to warrant the Maharaja in claiming to resume possession of the property as if in default of heirs. I shall however revert to this aspect of the case at a later stage. I pass by also for the present the agreement of 23rd January 1863, made between Gagarnath, Srinath and Mt. Suba Koer. Between 1842 to 1862, a period of 20 years, no question arises as to the succession of these ancestral estates. In 1862 the widow of Baijnath seems to have been in possession of the ancestral property, not by virtue of any inheritable right, but by reason of some special license conferred upon her, and

she remained in possession until her death. In 1874 Gagarnath the grandfather of defendant 1, who was a party to the agreement of 23rd January 1863, claimed to recover possession of the family property from the widow of Baijnath who was then in possession of the same.

Relying on the estate being impartible and descendible by the rule of primogeniture, the Judicial Commissioner, Mr. Davis, in his judgment, dated 22nd May 1874, held that the estate sought to be recovered was impartible; he denied Gagarnath's relief in that action because he held that Gagarnath was bound by the agreement of 23rd January 1863, and that as against him, the male heir, the widow was rightfully and lawfully in possession of the property under the provisions of that agreement. This judgment is of vital importance, and though it cannot operate in any sense as *res judicata*, we are entitled to attach considerable weight to its authority, being the judgment of a Court of competent jurisdiction which has never been impugned. The widow died in 1907, and she was predeceased by Gagarnath and Srinath, and, on her death, the eldest male issue in the lineal line entitled to succeed to the property as the heir of Baijnath was defendant 1. Defendant 1 entered into possession of the property as the male heir; and claims that he is entitled to hold the entire estate that is left after the portions assigned by way of maintenance grants have been deducted, and he assumes the right and title of thakur. Thus from 1765 to 1907, there has been only one attempt to challenge the impartibility of this estate and its method of succession by the rule of primogeniture; and this attempt failed in 1842.

As against this the question as to impartibility of the estate and the custom of descent were established by the judgment of 1874 of the Judicial Commissioner of Chota Nagpur. The line of descent by primogeniture, coupled with the impartibility of the estate, has continued from 1765 to 1907, a period of 142 years. The widow's period of possession does not operate to defeat this conclusion. She was put into possession by the male heir for her life; and never, from 1862 to the death of the widow in 1907, was there any question that the

estate was not by custom impartible and did not follow the line of succession by primogeniture, save in 1874 when these two questions were firmly established by the judgment of Mr. Davis. The documents and the admitted facts coupled with the oral evidence satisfy me beyond doubt that this estate is by custom impartible and follows the line of succession by primogeniture. In my opinion the custom alleged in this case by defendant 1 has been proved to my satisfaction to be a custom invariable, certain, continuous and ancient. The oral evidence is conflicting, but on a full consideration of all the evidence I incline to the opinion that the oral testimony adduced by defendant 1 is more reliable and trustworthy and consistent with the facts and the history of this case than the evidence adduced by the plaintiffs. The onus is on the defendant to prove the custom he relies on. I think he has done so; and the Privy Council have laid it down that where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family: *Garuradhwaja Prasad v. Superundhwaja Prasad* (2). I think the custom alleged in this case prevails in all estates granted by the Maharaja of Chota Nagpur; and every authority I have been able to refer to recognizes this custom, not only as a family custom prevailing in the Maharaja's family but also as the *lex loci* custom of Chota Nagpur.

As to the agreement of 23rd January 1863 made between the widow, Mt. Suba Koer, and Gagarnath and Srinath, I am satisfied it had no binding force or legal effect whatsoever which could destroy or invalidate the nature and quality of the ancestral property or modify or control its mode of succession. The alleged right jointly claimed in 1862 by Gagarnath and Srinath to be entitled jointly to succeed to the property on the death of Baijnath had no foundation in fact or law. The agreement of 23rd January 1863 was only, so far as Gagarnath and Srinath were concerned, an arrangement to make provision for the maintenance of the widow during her life: it conferred upon her no interest or estate which she had not otherwise acquired.

Srinath had nothing to bargain with; he was not the male heir entitled to succeed—he had at best only a *spes successionis* in this property. His claim to be jointly entitled to succeed with Gagarnath was, as I have stated, by custom of the family unsustainable. If this agreement had any vitality it could only bind the parties to it and could not affect or fetter the rights of the reversioners. The agreement of 23rd January 1863 has therefore no operative legal effect to alter or vary the impartible character of this property or to change its method of devolution; and so far as it is relied on by the plaintiff to support the theory of partibility of the estate, it is valueless, being grounded on mistake; or alternatively, at best, as an admission by persons whose admissions cannot bind or defeat the legal and legitimate interest of reversioners, whether in existence at the time are thereafter to be born.

The next question that arises is as to the grant of 8th September 1866 made by the Maharaja to Gagarnath and Srinath jointly of all the same lands contained in and granted by the three original grants of 1765, 1769 and 1786. After the death of Baijnath childless, the Maharaja contended that by the custom prevailing in his estate the interests granted by the three original grants lapsed to him by reason of the failure of male heirs and that consequently he, the Maharaja, became entitled to resume possession of all the property granted under the several grants of 1765, 1769 and 1786. The form of words used in the several original grants limiting or specifying the measure of the estate or the interest to be taken thereunder is "putra putradi," that is, to sons and grandsons. These words have been held by the Privy Council to convey an absolute perpetual estate in the lands descendible from generation to generation coupled with full power of alienation: *Sitaramji v. Jadunath Singh* (3). Authority however is to be found that these words of limitation may be controlled by custom limiting their scope and operation; and it is stated that in Chota Nagpur custom ascribes to these words the meaning, "so long as there are lineal male descendants entitled to inherit:" *Perkash Lal v. Rameswar Nath Singh* (4). Custom con-

3. AIR 1914 Oudh 255=24 I C 72.

4. (1904) 31 Cal 569.

2. (1901) 23 All 37=27 I A 233 (P C).

clusively proved and established can override or modify the ordinary law. Whether the case of *Perkash Lal v. Rameshwar Nath Singh* (4) be good or bad law it is immaterial to consider in the present case; but assuming that the words of limitation are controlled in Chota Nagpur by the custom alleged to exist there, in my opinion, there was no failure of heirs within the meaning of that custom to warrant or justify the Maharaja's right of resumption. There was a lineal heir in existence entitled to succeed to the ancestral estates, on the determination of the estate of inheritance vested in Baijnath, in the person of Gagarnath, the grandfather of defendant 1. Manifestly there was no failure of heirs in 1863 or 1866 to justify any legal right on the part of the Maharaja to resume possession of the property in dispute, because there were then in existence lineal male heirs entitled to succeed to the ancestral estates in accordance with the custom which we find to have been so conclusively established. It therefore becomes unnecessary for us to decide the question as to whether or not the widow of Baijnath on his death became entitled to an estate of inheritance in this property. This issue is not raised directly by the pleadings; and I deprecate deciding points not raised, and unnecessary for the purposes of the decision of the particular case before us. I therefore refrain from considering the applicability of the decision of the Privy Council in the case of *Thakurani Tara Kumari v. Chaturbhuj Narayan Singh* (5) and for the reasons given, it is unnecessary to do so.

In my view the prior existing grants of 1765, 1769 and 1786 were in 1866 subsisting, valid, legal grants; and that the re-grant dated 8th September 1866 was a mere nullity. If however the grant of 1866 had any legal force or efficacy I am of opinion it would operate as a graft upon the prior existing right and interest; and that the grantees thereunder, Gagarnath and Srinath, would be constructively trustees for the lineal male heir or heirs of Baijnath. The plaintiffs' case is entirely based on this document of 8th September 1866. In my view that document is in law and on the facts of this case a nullity

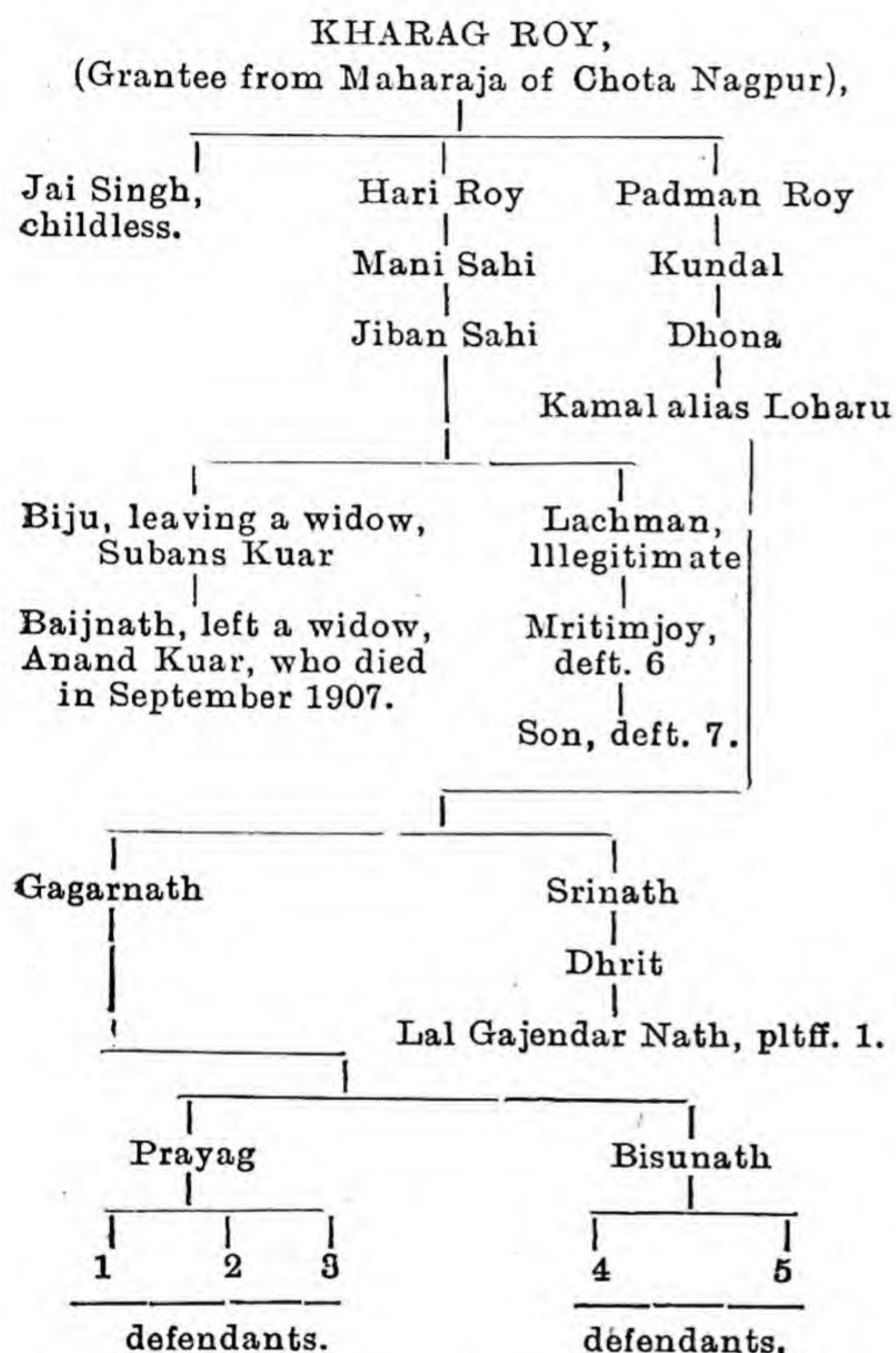
and thus it follows that the plaintiffs' case must fail. The question as to whether the waguzahst re-grant of 1866 could be supported on the principle recognized by the Courts of law and equity as a settlement by way of family compromise so as to bind the reversioners was not argued before us, or even pressed by the plaintiffs' counsel in this Court, or before the Subordinate Judge. If my view as to the legal validity of the re-grant of 1866 be correct, then there was no legal or substantial claim capable of being in dispute between the parties at the time upon which any settlement by way of a compromise could operate; and in addition no such claim is suggested directly or indirectly in any part of the plaintiffs' plaint.

Plaintiff 1 has elected to stand on the re-grant of 1866 as forming the basis of his claim and by that election he must now stand or fall. One word as to the lease of 15th April 1908 to Mr. Ambier. Reliance is placed on the recitals therein contained: "we the declarants as heirs according to the Mitakshara law" and "members of a joint Hindu family." These recitals are not inconsistent with the estate being impartible. They were relied upon to prove that the estate by admission was partible, but an impartible estate may be and often is joint as the junior members of the family have a right of maintenance therein, even though the property passes to the eldest male heir as the legal owner of the property. As to the claim of plaintiff 1 to recover the property set forth in Sch. B to the plaint from defendants 6 and 7, I am clearly of opinion that he has failed to establish the charges of fraud that he has made or to establish in any sense his right to these properties or any part thereof. Consequently, in my opinion, the plaintiffs' claim in this action should be dismissed with costs in all Courts.

Chapman, J.—This is an appeal by the plaintiffs. The principal plaintiff is Lal Gajendra Nath Shahdeo. The other plaintiffs are transferees from him of portions of the interest claimed in the suit. The plaintiffs claimed a half share of certain properties originally granted by the Maharaja of Chota Nagpur to Kharag Roy, and prayed for a partition and for mesne profits. The suit has been dismissed by the first

5. (1915) 42 Cal 1179=30 I C 833=48 I A 192 (P C).

Court upon the ground that the properties formed part of an impartible estate, and that under the rule of primogeniture, which it was found governed the succession, Lal Gajendra Nath, plaintiff 1, was not entitled to any share in the property, inasmuch as he is descended from a younger son of the junior branch of the family of Kharag Roy. In order to understand the facts of the case it is necessary to set out a portion of the genealogy of the family:



The facts are as follows: In the middle of 18th century Kharag Roy came with his father and brothers to Chota Nagpur, and in the year 1765 a "birt patta" of a village in Chota Nagpur was executed in his favour by the Maharaja of Chota Nagpur, to whom he was related. The property was leased to Kharag with his son, grandsons, etc., "putra putradi" (Ex. C-1). In 1768 he was given another birt patta by the Maharaja (Ex. C) of 13 villages, and here again it was recited that his son and grandsons should enjoy the property. In 1786 a further grant (Ex. C-2) was made by the Maharaja to

the then surviving sons of Kharag Roy, Hari Roy and Padman Roy, and it was recited again that their son and grandsons should enjoy the property. A reference to the genealogical table will show that Baijnath is the fourth in direct male succession from Hari Roy, the elder son of Kharag Roy. Baijnath died in December 1862 childless, leaving a widow named Anand Kuar. The properties, with the exception of certain properties which had been alienated for maintenance, came into the possession of the widow Anand Kuar. The Maharaja of Chota Nagpur then asserted the right to resume the property upon the ground, no doubt, of the failure of the senior male line of succession. At the same time, the two brothers Gagarnath and Srinath, who were descended from Hari Roy's younger brother Padman Roy, claimed to succeed to the property. These disputes resulted in the execution of two deeds, one Ex. 8, dated 20th January 1863, by Gagarnath and Srinath to the effect that they had agreed with the widow Anand Kuar that she should hold possession of the property as long as she lived, upon payment of rent by her to the Maharaja, and that they should take possession of the villages after her death. The other deed (Ex. 23) was executed by the Maharaja of Chota Nagpur upon 8th September 1866. The deed is called a "waguzasht sanad" and recites that on receipt of a thousand rupees the Maharaja releases the properties in favour of Gagarnath and Srinath, half and half. Plaintiff 1 in the present suit is descended from Srinath. He claims Srinath's half share of the properties under this grant by the Maharaja of the year 1866, and also by reason of the right of inheritance. Defendants 1 to 3 are sons of Gagarnath's elder son, and defendants 4 and 5 are descendants of Gagarnath's younger son. Defendants 6 and 7 are the son and grandson, respectively, of an illegitimate son of Jiban Sahi, the grandson of Hari Roy. Defendants 6 and 7 claim certain of the properties partly upon the ground of long possession, partly upon the ground of a mukarrari grant, and partly upon the ground that they were allowed to retain the properties for their maintenance. As I have said the suit was dismissed mainly upon the ground that the estate was impartible and that the

rule of primogeniture prevailed in the family, so that, in any event, plaintiff 1 who is descended from a younger son of the junior branch of the family, inherited no title to any share of the property.

The plaint alleges that the properties sued for were the hereditary jagirs of Baijnath Sahi. The plaintiff says in his evidence that the entire property belonged to Baijnath. The plaintiff further alleges that Gagarnath and Srinath became entitled to the estate on the death of Baijnath. There is an allegation in the plaint that Anand Kuar, the widow of Baijnath, because possessed of the properties by right of inheritance, but the later allegation that Gagarnath and Srinath were entitled to succeed is inconsistent with this. It is in fact essential to the plaintiff's claim to a half-share by right of inheritance to say that the widow did not inherit, for Gagarnath and Srinath died in the widow's lifetime, and the plaintiffs claim through Srinath. The written statement of defendants 1 to 3 also alleges that the entire estate was inherited by Baijnath, and that, as a special case, his widow was allowed to remain in possession until her death, but that the succession in fact remained in abeyance. These defendants say that after the death of Baijnath's widow, defendant 1, the eldest male heir of the senior branch of Gagarnath's family, entered into possession. Defendants 4 and 5 did not contest and defendants 6 and 7 support defendants 1, 2 and 3. The only possible inference from the pleadings of both parties and the evidence of plaintiff 1, is that the entire estate (saving certain alienations made by way of maintenance from time to time) descended to Hari's son and son's sons and that on failure of male issue in the direct line from Hari, the property went to the then existing male issue in the direct line from Padman, the younger son of Kharag.

It follows that the Maharaja of Chota Nagpur had no right to resume on the death of Baijnath, for there had not been any failure of male heirs to the grantee, Kharag. The plaint in fact states that the endeavour to resume was improper. In so far therefore as the plaintiff's claim is based upon the waguzasht sanad by the Maharaja in

favour of Gagarnath and Srinath in September 1866 the plaintiff's case must fail, for the Maharaja, not having any right to resume, had no right to make that grant. It remains to consider whether the plaintiffs can succeed by reason of right of inheritance. The plaintiffs' case on this alternative ground appears to be that on Baijnath's death Gagarnath and Srinath both at once inherited each a half-share, and that plaintiff 1 succeeded to Srinath's half share by representation. I assume that the widow did not inherit, for otherwise the plaintiff's case must fail. The first question to consider thus is whether when the new line of succession opened upon the death of Baijnath, Gagarnath had the right to succeed to the exclusion of Srinath, or whether both Gagarnath and Srinath inherited each a half share. I proceed to consider the evidence in favour of the plaintiffs' contention that Gagarnath and Srinath both inherited. If they did not both inherit, the plaintiffs who claim through Srinath have, of course, no case by right of inheritance. The appellants' counsel relied, in the first place, on the terms of the leases of 1765 to 1786. The lease is given in each case to the lessee and his son and grandsons, etc., (putra putradi.) It has been held by the Privy Council that a modern Hindu will executed in these terms in Bengal would now create an absolute estate unconditioned and unlimited. If this were the case here, the plaintiffs, as members of an undivided Mitakshara family, would be entitled to a share, though not to a half share. But none of the wills dealt with the Privy Council are earlier than the year 1868. The ground of the decisions appears to have been that the words "putra putradi" had by that time, 1868, acquired a technical significance. Our documents are nearly a hundred years prior to 1868 and were executed in a very backward part of the country. It is quite impossible to say that in 1765, before the arrival of our jurisdiction, in the forests of Chota Nagpur the words "putra putradi" had acquired a technical significance. As I have said, it is not the case of either party that the estate was governed by the ordinary rule of survivorship in the Mitakshara, as it would have been if the interpretation given to the words

"putra putradi" by the Privy Council were held to prevail, and *optimus interpret rerum usus*. The family have for several generations interpreted the words "putra putradi" in the present case to mean, what in fact they literally mean, son and son's sons. The next point in favour of the plaintiffs' contention is the fact that Gagarnath and Srinath executed the joint deed in favour of Baijnath's widow in 1863, and subsequently accepted a joint sanad from the Maharaja. But it must be remembered that even according to the defendants' case Srinath would have succeeded in the event of Gagarnath's death without male issue. It may be that it was with this in view and in order to save future trouble that Srinath's name was joined with Gagarnath's in these deeds.

It is common ground that in spite of the joint grant of some property to the two brothers Hari and Padman in 1786, the elder brother's (Hari's) son succeeded in preference to Padman's. There is further the fact that these deeds of 1863 and 1866 were entered into under the pressure of a threat by the Maharaja to resume the estate. This is stated both in the plaint and in the written statement of defendants 1, 2 and 3. The plaintiffs next rely upon the fact that defendants 1, 2 and 3 entered into certain transactions in the year 1908 (Ex. 2) in which they described themselves as heirs under the Mitakshara law. The expression was probably imperfectly understood, and, in any case, it does not involve any clear admission that Srinath's family had any title to the property. A stronger inference in favour of the plaintiffs can be drawn from the fact that in this transaction defendants 1, 2 and 3 allowed to be joined with them as co-lessor defendant 6, who derived his title to that particular property from a lease from plaintiff 1. That is the sum of the main evidence in support of the plaintiff's case.

On the other hand, in favour of the opposite contention that Gagarnath succeeded to the exclusion of Srinath, is the fact that Gagarnath put this claim to exclusive succession forward so far back as the year 1874 before the Judicial Commissioner of Chota Nagpur. His claim was held to be good (Ex. D); his suit, which was for recovery from the widow Anand Kuar, being defeated only

upon the ground that he had entered into the agreement with her in 1863. The learned Subordinate Judge is wrong where he says that Srinath appeared in that suit, but the fact that Srinath did not appear does not do away with the evidence that Gagarnath then successfully asserted a right to succeed to the exclusion of Srinath. As to the value of the oral evidence I see no reason to differ from the appreciation of it expressed by the learned Subordinate Judge. The other documents put forward have also been rightly estimated by him, for it must not be forgotten that Srinath had a right to succeed upon the death of Gagarnath without male issue, and that therefore it was not unnatural for Srinath to join with Gagarnath in signing papers and executing deeds. He was joint in mess with Gagarnath. I have found that Hira's son succeeded to Kharag's estate in preference to Hari's younger brother Padman's son. This was without objection. It is therefore probable that Gagarnath's family had the right to succeed to the exclusion of Srinath's, and that this was so, is supported by a substantial preponderance of evidence. Moreover they are in possession. I therefore hold that the plaintiff's claim by right of inheritance must fail.

I have carefully considered whether the plaintiffs could succeed upon the ground that the waguzasht sanad of 1866 was the result of a family arrangement which could be upheld upon the principle for which *Stapilton v. Stapilton* (6) is the leading authority. The story told in the judgment of the Judicial Commissioner in 1874 suggests that upon the death of Baijnath the Maharaja claimed the right to resume, and went so far as to attach the property. All the members of the family assembled and protested, but the Maharaja declined to make any concession further than a grant to the widow for her life. The result was that the brothers agreed to allow the widow to remain in possession for her life, and subsequently took a regrant from the Maharaja, the terms of which were drawn so as to avoid any recognition of any title in the widow while at the same time it discharged the Maharaja from the duty of maintaining her. But no such case was distinctly

made in the plaint and I have with reluctance decided that the plaintiffs should not be allowed to make it now. Indeed, their counsel did not respond very readily to my suggestion that he should be permitted to do so. And I have not been uninfluenced by the indications that this litigation is a mere speculative indulgence on the part of plaintiffs 2 to 9, to whom plaintiff 1 has sold half his interest.

I have scrupulously avoided deciding any question the decision of which did not appear to be absolutely necessary upon a proper interpretation of the pleadings. I have not, for instance, decided the question of the right of the widow to succeed. The pleadings and the evidence seem to suggest that the widow had no right to succeed, for both parties appear to plead that the grant was limited and conditioned, and the words "putra putradi," if they are words of limitation at all, would exclude the widow. I note that in the case before the Judicial Commissioner in 1874 the widow indirectly conceded that if her husband had not obtained a separate share by partition she had no right to succeed. But I express no opinion on the question, for it was not fought out. It is, in my view, important to avoid so far as possible making judicial pronouncements which are not absolutely necessary for the determination of a case as set out by the pleadings of the parties, more especially as such pronouncements tend in any event to precipitate and to fossilise legal conceptions which, in the case of Chota Nagpur, at any rate, are probably transitional and temporary. There is also a peril of an opposite but equally serious kind, I mean the danger of antedating modern ideas.

The case has not been well conducted on behalf of the plaintiffs at any stage. I would dismiss the appeal with costs.
V.S./R.K. *Appeal dismissed.*

A. I. R 1916 Patna 346

CHAMIER, C. J.-AND JWALA PRASAD, J.
Bajinath Goenka and others—Plaintiffs—Appellants.

v.

Ajab Lal Jha and others—Defendants—Respondents.

Second Appeal No. 430 of 1913, Decided on 24th March 1916.

Cosharer—Liability for profits of excess land by private arrangement—Cosharer is not liable.

Where a cosharer is in possession of kamat lands in excess of his share under a private arrangement between the cosharers, he is not liable to account for profits to the cosharer who has the land less than what he was entitled to.

Karunamoy Bose—for Appellants.

Guru Das Sinha—for Respondents.

Judgment.—The parties to the suit out of which this appeal arises are co-sharers in a $2\frac{1}{4}$ -annas patti in a village. The plaintiffs' own $1\frac{1}{4}$ -annas and the defendants to another suit tried along with this suit own the remaining one anna. The plaintiff's case is that in the village there are 100 bighas 10 cottas and 17 dhuls kamat lands, that the plaintiffs are in possession of 23 bighas 12 cottas of these lands, that the defendants in the present suit are in possession of 28 bighas 17 cottas and 17 dhuls of the land and that the defendants in the other suit are in possession of 43 bighas 17 cottas 14 dhuls of the land. The plaintiffs' case is that as they are in possession of a smaller area of the kamat land than should be given to them according to their share in the patti, the defendants in the two suits should account to them for the profits which they receive from the land in the possession in excess of their shares. The defendants case is that the parties and their predecessors-in-title have been in possession of the land which they now hold for several generations, and they suggest that the existing state of affairs is due to an arrangement made many years ago. Both parties gave evidence. The Munsif dealing with this question said:

"The defendants aver, and there is evidence on the record to show, that the cosharers are in separate possession of the kamat land by a sort of partition or arrangement amongst themselves."

On appeal the Subordinate Judge said:

"In the present case the very long enjoyment, by the cosharers including the plaintiffs and before them their predecessors, of separate parcels of land sufficiently shows that it has been done on arrangement amongst themselves."

There are thus clear concurrent findings by the Courts below that the state of affairs which now obtains in this patti is the result of an arrangement arrived at many years ago. The plaintiffs rely on the decision of their Lord-

ships of the Privy Council in the matter of *Watson & Co. v. Ramchund Dutt* (1) and the decision of the High Court at Calcutta in *Lloyd v. Bibee Sogra* (2). In the latter case the Chief Justice in dealing with the rights of cosharers as to separate possession of joint land said:

"We take it to be perfectly clear that every co-owner of such property is entitled to take a part in determining how it shall be used, unless restrained by local custom or special agreement."

The closing words of this passage show clearly that in the opinion of the learned Chief Justice it was important to ascertain in a case of this kind, whether the separate possession of the parties was the result of a special agreement. Similarly in the judgment of their Lordships of the Privy Council there are passages which show clearly that the right of separate sharers to the possession of joint lands may be modified by agreement. It appears to us that there is nothing in either of these cases which in any way supports the plaintiffs' contention in the present case. On the findings of the Courts below we must hold that the plaintiffs are not entitled to disturb the existing arrangement. The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

1. (1891) 18 Cal 10=17 I A 110.
2. (1876) 25 W R 313,

A. I. R. 1916 Patna 347

ATKINSON AND JWALA PRASAD, JJ.

Mukunda Lal Chakrabarty—Plaintiff—Appellant.

v.

Jogesh Chandra Chakrabarty and others—Defendants—Respondents.

First Appeal No. 469 of 1914, Decided on 14th June 1916, from decision of Addl. Sub.-Judge, Manbhum, D/- 27th July 1914.

(a) **Hindu Law — Partition — Omission to specify some of joint properties in plaint—Amendment of plaint should be permitted—Civil P. C. (5 of 1908), O. 6, R. 17.**

The plaint in a suit for partition of the properties of a joint Hindu family should set forth all the properties of the family. Should any, however, be omitted by inadvertence or mistake, the suit should not be dismissed, but the plaint allowed to be amended by supplying the omission: 28 Cal. 769, *Foll.*; 14 Cal 122 and 35 Cal. 961, *Ref.* [P 348 C 1]

(b) **Civil P. C. (5 of 1908), S. 153—O. 6, R. 17—Powers of amendment are very wide.**

The widest power of amendment is given, not only to the original, but also to the appellate

Court to enable the Court to try all matters properly in dispute between the parties.

[P 348 C 2]

Lal Mohan Ganguli—for Appellant.

Naresh Chandra Sinha and Gour Chandra Pal—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit for partition of movable and immovable property alleged to belong jointly to the plaintiff and the defendants. The plaintiff is the uncle of the defendants. The property sought to be partitioned consists of a number of movable and immovable properties, the details of which are set forth in the schedules attached to the plaint. The defendants in their written statement took objection to the suit being maintained in the present form, inasmuch as all the joint properties of the family were not included in the schedule attached to the plaint. The defendants at that stage did not disclose the names or the nature of the properties said to have been omitted by the plaintiff. Apart from this objection the defendants also claim that most of the properties included in the schedule to the plaint were the self-acquired properties of their father, and that the plaintiff had no right to have the said properties partitioned. The learned Subordinate Judge in the Court below upon the pleadings of the parties framed the following issues for its determination: 1. Is the suit maintainable in its present form? 2. Did the plaintiff and the defendants live in joint mess, and are the properties described in the plaint joint properties of the parties? 3. To what relief, if any, is the plaintiff entitled?

After evidence was given by the parties, the Court, by its judgment dated 27th July 1914, dismissed the suit, solely upon the ground that the plaintiff had omitted five properties, two of which were immovable and three movable, from the list of joint properties attached to the plaint for partition. The learned Additional Subordinate Judge did not, however, try the other issues, 2 and 3. The plaintiff has appealed and seeks to have the order of the Subordinate Judge reversed and also asks to be permitted to amend his plaint in such a manner as to include the properties that were omitted from the plaint originally, and which were found by the learned Subordinate Judge to be the joint property

of the family, and to allow the original suit to proceed to final determination. The learned Subordinate Judge was of opinion that the action brought by the plaintiff was not maintainable by reason of the omission of the specified properties from the suit and that as a consequence the suit must necessarily be dismissed; and that the plaintiff must institute a fresh suit including all the joint family property, if he desires to proceed and enforce a partition of the joint property. The learned Subordinate Judge relied upon the rulings quoted in the cases of *Jogendra Nath Mukerji v. Jugobundhu Mukerji* (1) and *Jogendra Nath Rai v. Baldeo Das* (2), in support of his decision.

It is true that in a suit for partition of joint family property by a Hindu, all the properties must be included in the action, and the reason for this proposition is to save the parties from multiplicity of proceedings. On the other hand, if by inadvertence, mistake or fraud of any of the parties, some of the joint properties are not partitioned by the institution of the original suit, there will be no bar after the partition to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered. All that is required in a suit for partition is that all the properties that are known to be joint family properties at the time the suit for partition is instituted, must be included in the action for partition. But the question here is, whether or not the suit should have been dismissed, or the Court should have allowed the amendment of the plaint, suo motu or at the instance of the parties, so that the partition might be effected in this action; and that the plaintiff should not be forced unnecessarily to bring another action for the same relief, and thus to cause the same evidence, if not more, to be given at the second hearing, and delay the separate enjoyment of the properties by the parties according to their shares. In a case like the present one it was, I think, the obvious duty of the Court to have allowed the amendment of the plaint and as amended to allow the action to proceed, including all the properties that were found to be joint family properties. Such power of amend-

ment is vested in the Court by the provisions of S. 153, Civil P. C., coupled with O. 6, R. 17.

The latter rule enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just, whereas S. 153 empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action. This power is vested both in the original as well as in the appellate Court. This view was taken in the case, of *Srimohan Thakur v. Macgregor* (3). I entirely concur with the view taken in that case, and I think that the learned Subordinate Judge should have allowed the amendment and proceeded to try the other issues in the case. It is not denied by the learned vakil for the respondent that the Court had power to amend the plaint and that it would not have been improper to have done so in this case. His only objection to the amendment of the plaint is, that the respondent will be very much prejudiced if the plaint is allowed to be amended at this stage, when all the evidence has been given, whereas, if the suit is dismissed and a fresh suit is brought, he would be in a better position, for then he would be able to adduce fresh or additional evidence. I do not think that there is any substance in the contention of the learned vakil for the respondent, or in the grievance that he complains of. The lower Court has only tried issue 1 and has dismissed the suit on the preliminary ground. The trial of the other issues, on the case being remanded, will proceed and the defendants will certainly be able to make any submission as regards those issues that they consider proper. We think therefore that the decree of the Subordinate Judge, as it stands, must be set aside and the case remanded to the lower Court to try the issues that were left by it undetermined, and to commence the inquiry at the stage at which it terminated by the order of 27th July 1914 on the plaint as amended by the inclusion of the five denominations of properties that have been found by the learned Court below to be joint family properties.

Now, it remains to consider the terms upon which this order of remand must

3. (1901) 28 Cal 769.

1. (1887) 14 Cal 122.

2. (1908) 35 Cal 961.

be made. It was entirely the fault of the plaintiff not having included all the properties in the suit for partition. The defendant-respondent was put to great expense and inconvenience in the lower Court in having to prove that the properties omitted from the plaint were joint properties, and I think that he is entitled to costs for all the trouble and expense he had to incur on account of his having to prove that the properties were joint. We assess these costs in the lower Court at a sum of Rs. 100. He is further entitled to the costs of this appeal, which again will be assessed at another Rs. 100. The order of the Subordinate Judge is set aside, and the case remanded, on condition that the plaintiff-appellant pays to the defendant-respondent the sum of Rs. 200 as costs both in the lower Court and of this appeal.

Atkinson, J.—I agree in the main with the views expressed by my learned brother. I only want to say one word on the legal aspect of the case. The learned Judge decided this case on the basis, that if a plaintiff in an action for partition of joint Hindu properties omits to include any item of the joint property in his list or in his schedule to his plaint, that then, per se, the action must be dismissed, and that no right of amendment exists, either in the primary Court or in this Court, which would enable the error to be corrected and the action proceeded with in the ordinary way, and he relies upon the case reported as *Jogendra Nath Mukerji v. Jugobundhu Mukerji* (1) in support of that view. In my opinion the widest power of amendment is given, not only to the primary Court, which enables the Court to try all matters properly in dispute between the parties. I think it would be a manifest injustice if the power of amendment did not exist in a case such as the present one. No doubt, the plaintiff must make compensation for the error. To avoid multiplicity of suits the law has endowed all Courts in all countries with just and most ample powers of amendment, and in my opinion, this case is one in which the power of amendment should have been exercised by the learned Judge. In this view we are fortified by the decisions which have been cited, and by the admission made by the learned vakil for

the respondent on appeal, to the effect that he did not dispute that the right of amendment existed, not only in the lower Court, but also in this Court.

Accordingly we shall remit this case, subject to the amendment that the plaintiff be allowed to include in his schedule to the plaint of the joint properties the five denominations of properties omitted therefrom, as found by the Judge. The case will be remanded and will proceed before the learned Judge as if he had proceeded with the trial on 27th July. I agree with my learned brother as to the question of costs. Should any other property be discovered to be joint, Court will be at liberty to include it in the plaint for partition.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 349

MULLICK, J.

Ganga Ram Rai and others—Plaintiffs
—Appellants.

v.

Maula Baksh and others—Defendants
—Respondents.

Appeal from Appellate Decree No. 96 of 1915, Decided on 25th April 1916.

(a) Civil P. C. (5 of 1908), O. 41, R. 31—Requirement of R. 31 when not satisfied explained—In reversing judgment reasons should be given.

A judgment of an appellate Court reversing that of the Court of first instance was in the following terms: I am unable to agree with the Munsif that this entry (Record of Rights) is proved to be wrong. The evidence is not, in my opinion, sufficient to come to such a conclusion:

Held: that the judgment was in contravention of the provisions of O. 41, R. 31, Civil P. C., 1908. When the judgment of an appellate Court is one of reversal, the aggrieved party is entitled to a consideration of the points on which the lower Court relied for the purpose of giving the successful party a decree. [P 350 C 1, 2]

(b) Words—*Jotedar* means tenure-holder or raiyat.

The expression "jotedar" may mean either tenure-holder or raiyat. [P 350 C 1]

Ganesh Dutt Singh and Sivanandan Ray—for Appellants.

Khurshed Husnain—for Respondents.

Judgment.—The plaintiff is the landlord and the defendant is the tenant. The plaintiff sues for ejectment on the ground that the defendant is a trespasser. The Record of Rights shows the plaintiff to be a tenure-holder and the defendant to be an occupancy-raiyat. The Munsif found that the plaintiff was

an occupancy-raiyat and the defendant an under-raiyat. The plaintiff's claim for khas possession was dismissed. On appeal by the defendant the learned District Judge has found that the Record-of-Rights has not been rebutted and that the defendant is not an under-raiyat but a raiyat and he accordingly decreed the appeal. The present second appeal is by the plaintiff, who asks for the restoration of the Munsif's decree. The first point taken is that the defendant admitted in the first trial that the plaintiff was an occupancy-raiyat, but it does not appear that there was any express admission to this effect. All that the defendant admitted was that Chulhai, the predecessor of the plaintiff, cultivated 10 bighas out of the whole holding which measures 15 acres, that is about 23 bighas. There is nothing therefore in the contention that the plaintiff's status as occupancy-raiyat has been proved by the defendant's own admission.

But the next point is more substantial. It is contended that the judgment of the learned District Judge is not one according to law and that it offends against O. 41, R. 31. I agree with the learned District Judge that the expression "jotedar" used by witnesses on behalf of the defendant in reference to the plaintiff's title is inconclusive. It may mean either tenure-holder or raiyat. I also agree that there is no direct evidence to show for what purpose that tenancy was created, but the learned Munsif has considered the whole evidence in the case and come to the finding that the plaintiff cultivated the whole holding himself for 32 years and he has inferred from that that the plaintiff's status is that of an occupancy-raiyat. With regard to this part of the case the learned District Judge has disposed of it in the following words :

"I am unable to agree with the Munsif that this entry (Record-of-Rights) is proved to be wrong. The evidence is not, in my opinion, sufficient to come to such a conclusion."

I think that the plaintiff is entitled to a fuller consideration of his case before the Munsif's decree can be set aside. It would have been otherwise if the judgment had been one of affirmance, but when the judgment is one of reversal the aggrieved party is entitled to a consideration of the points upon which

the lower Court relied for the purposes of giving the successful party a decree. It is not easy to lay down in general terms what degree of particularity is required on the part of an appellate Court in the examination of the evidence ; but having regard to the particular facts of the case before me, I think it is necessary in the interests of justice that the case should be remanded to the lower appellate Court for re-hearing and for recording a judgment in accordance with law. The decree is accordingly set aside. Costs will abide the result.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 350

ATKINSON, J.

Raja Ram Lal and others—Defendants—Appellants.

v.

Hanuman Upadhyya and another—Plaintiffs and Defendants—Respondents.

Second Appeal No. 2962 of 1913, Decided on 3rd May 1916.

(a) **Transfer of Property Act (4 of 1882), S. 58—Usufructuary mortgage—Property subsequently sold under revenue sales act—Mortgagee obtaining lease of partition from assignee—Mortgagee sued for personal decree—Held suit within six years of disposition was not barred—Limitation Act (9 of 1908) — Further held revenue sale extinguishing security subsequent lease to mortgagee does not affect mortgagor's liability—Lease was not as mortgagee.**

An usufructuary mortgage was executed in 1891 in favour of the plaintiff. The mortgaged property was sold under the provisions of the Revenue Sale Act on 25th August 1905. The purchaser got actual physical possession on 22nd March, 1906, and on 16th July 1908 transferred it by way of gift to a third person. The donee in his turn, on 16th July 1908, let a portion of the mortgaged property to the plaintiff who was the mortgagee under the deed of 1891. On 26th August 1911, the plaintiff brought a suit on the basis of his mortgage for a personal decree against the mortgagors:

Held: (1) that the suit was not barred by limitation, as the cause of action accrued to plaintiff on 22nd March 1906 when he was ousted from the property; (2) that the mortgage security having been completely extinguished under the provisions of the Revenue Sale Act in 1905, the subsequent re-letting to the plaintiff had not the effect of operating as a graft upon the prior interest of the mortgagor; (3) that the possession of the mortgagee by virtue of the property being let out to him was not qua mortgagee and consequently his suit for a decree for money against his mortgagor was not barred: 5 Cal 198 (PC); and 36 Bom 539, Dist. [P 351 C 2 ; P 352 C 1]

(b) **Transfer of Property Act (4 of 1882), S. 90—Scope—Does not apply except in cases where mortgagee has sued on mortgage and found deficiency in price fetched**

in execution—Mortgagee can sue for personal decree.

Section 90, T. P. Act, has no application, except in cases where the mortgage deed has already been sued upon and a decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognized that a mortgagee has the right to proceed concurrently with all the remedies he is entitled to, to enable him to realize his debt. He is perfectly entitled to sue on the personal covenant contained in a mortgage-deed. [P 352 C 1]

(c) Mortgage—Liability of—Joint mortgagors—It is joint and several—They may contribute among themselves.

Mortgagors are jointly and severally liable to the mortgagee, though as amongst themselves they are entitled to contribution. [P 352 C 2]

Rajendra Prasad for Harihar Prasad Sinha—for Appellants.

Susil Madhab Mullick—for Respondents.

Judgment.—This is an action to recover Rs. 999 as and for principal and interest on foot of a mortgage bond dated 13th July 1891. The bond was executed by defendants 1 and 4 and father of defendants 5 to 8. The land comprised in the mortgage was 18 bighas situate in Mauza Kasurha. The mortgagee now seeks to recover on foot of the personal covenant in the mortgage-deed the amount of principal and interest due. The mortgaged property was partly sold at a revenue sale in March 1899 and again a part was sold in June 1899, and the purchaser of both these parts was subsequently sold out by the Revenue Authorities for arrears due, when the entire estate was re-sold on 25th August 1905 under the provisions of the Revenue Sale Act. The 3rd sale was the sale of the entire property and under the provisions of the Revenue Sale Act the land became discharged from all encumbrances. The purchaser at the revenue 3rd sale was Harihar Prasad Singh. He purchased the property on 28th August 1905 and he got actual physical possession of the land on 22nd March 1906 and the land was sold by the Revenue Authorities to satisfy an arrear due on 26th June 1905. The contention put forward by the appellant is that this action is time-barred inasmuch as, he alleges, the cause of action arose on 7th June 1905. In my opinion the cause of action did not arise on 7th June 1905; that is a date only fixed for the purpose of title and does not at all affect the question of

possession on which depends the applicability of the Statute of Limitation.

It is alternatively contended that if the cause of action did not arise on 7th June 1905, then it arose on 25th August 1905, the date of the 3rd sale, and the plaintiffs' right to bring this action on the foot of their mortgage-deed would begin to run from that date and if that be the date taken, then they are statute-barred because the plaint was insufficiently stamped on the date it was filed. The plaint was filed and registered on 26th August, and was not fully stamped under the provisions of the Court-fees Act and it is alleged that by reason of this fact the limitation of time within which this action should have been brought, viz., six years, would have expired for the suit was not duly instituted. It is not necessary for me to go into the question arising out of the Court-fees Act and the insufficiency of the stamp, because I hold that the time on which the cause of action in this case began to run would be 26th March 1906 the date when the possession of the mortgagees was in fact determined by ouster. But if it became necessary to consider whether or not the plaint filed on 26th August 1911 was in time, I would be prepared to hold on the evidence adduced in this case that the plaint having been duly registered and filed even though insufficiently stamped on 26th August 1911, that even then the suit was in time. That disposes of the main point in this case and as to that I am satisfied that this action is in time and the defence pleaded of the Statute of Limitation is not maintainable.

It is contended, furthermore, that the plaintiffs are barred by being in possession, or at least having got a re-letting of the land, from the auction-purchaser who purchased in August 1905 or from his donee, inasmuch as that re-letting was made to a person occupying the position of a mortgagee and was a graft upon the original interest of the mortgagors and that thus the mortgagee was in fact and law, and still is, in possession of the mortgaged property. In my opinion that argument both in law and fact utterly fails. The question is one of mixed law and fact and the facts are not such as would in this case enable one to apply the legal principle of graft.

The entire estate had been sold under the Revenue Act, all rights of the mortgagee had been barred, the old title was completely extinguished and the auction purchaser conveyed on 16th July 1908 (two years later) the property which he purchased, to some person as a gift and that person on 16th July 1908 made a letting of 15½ bighas of the lands originally mortgaged to the plaintiffs who had been mortgagees in respect of the 18 bighas of land, the subject-matter of the mortgage-deed of 18th July 1891. In that view it is impossible to contend that that letting could operate as graft upon the prior interest of the mortgagors. The cases referred to as *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) and *Gurbasappa Sangappa v. Rango Venkatesh* (2) in my opinion do not apply. In order that the doctrine of graft could apply there must be some life in the old stock, that is, in the old interest. In this case there is no such life, the interest was dead and determined by the sale and by operation of law.

It is further argued that the plaintiffs must pursue the relief they seek against the purchase-money representing the land sold, viz., Rs. 7,500, before they can proceed upon their personal covenant. S. 90, T. P. Act, is relied upon to support this contention. S. 90 has no application, except in cases where the mortgage-deed has already been sued upon and a decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognized that a mortgagee has the right to proceed concurrently with all the remedies he is entitled to, to enable him to realize, his mortgage-debt. He has elected to proceed in this case on the personal covenant contained in the mortgage-deed. In my opinion he is clearly entitled to do so. It is said that Rupees 7,500 out of the sale-proceeds of this land was lying in the Collectorate and available to satisfy the mortgagee's debt. If this money was really available to the mortgagee, as Mr. Mullick very properly points out, nobody but a fool would have resorted to the course adopted, viz., taking the chance of realizing his debt by suit on the personal covenant.

But we know nothing about the history of the Rs. 7,500. There may have been prior mortgages affecting it. It may have been appropriated for purposes of which we know nothing. But I can hardly conceive it possible that a man who was a creditor, would allow the chance of getting paid his money pass without making an effort to get paid his debt, if there was a fund available to his hand for the purpose.

Then it is further contended that the mortgagors are only liable jointly in respect of their shares, or, as the learned Vakil for the appellant puts it, liable by way of joint contribution. That argument is equally fallacious. Mortgagors are jointly and severally liable. As between themselves, of course, there may be contribution as between themselves does not affect the rights of the mortgagee. But as a basis of contribution as between the mortgagors themselves there must be a payment by one in satisfaction of the entire debt; then as between the one who pays the debt and the other the right to contribution may arise. But the mortgagee is entitled to recover from both jointly and severally. For these reasons I am clearly of opinion that the learned Subordinate Judge was right and properly dismissed this action with costs. I dismiss the appeal with costs.

V.S. / R.K.

Appeal dismissed.

A. I. R. 1916 Patna 352

CHAMIER, C. J. AND JWALA PRASAD, J.
Dwarka Singh—Petitioner.

v.

Layakat Ali Khan—Opposite Party.

Civil Revn. Petn. No. 107 of 1916,
Decided on 4th April 1916.

Limitation Act (1908), S. 5 — Sufficient cause—Time spent in review is not—When time spent in review can be excluded depends on circumstances.

It is not always a 'sufficient cause' for presenting an appeal after time that the appellant was unsuccessfully prosecuting an application for review of the judgment appealed against.

Whether the time occupied in proceedings for review may be deducted for admitting a belated appeal depends on the circumstances of each particular case.

It is common practice to file an appeal as well as an application for review. Where the application for review related to a small matter, the acceptance of which would not have rendered unnecessary an appeal, or where it must have been obvious to the appellant that the review petition could not be disposed of within the time

1. (1880) 5 Cal 198=6 I A 145 (PC).

2. (1912) 36 Bom 539=16 I C 348.

limited for appeal, Courts will be slow to excuse the delay in filing the appeal. [P 352 C 2]

Ganesh Dutt Sinha and Nirsu Narain Sinha—for Petitioner.

Judgment.—A suit was brought against the present applicant and two other persons for rendition of accounts. The preliminary decree was made in August 1913, and a pleader was appointed Commissioner to take the accounts. The Commissioner found the applicant liable for a sum of Rs. 3,777. The applicant lodged a number of objections against the finding of the Commissioner. Some of them were allowed, with the result that the sum payable by the applicant was reduced to about Rs. 2,420 and a final decree was made on 24th March 1915 for payment of that sum and costs amounting to Rs. 1,220 odd were awarded against the applicant. On May 26th, that is, a little over two months after the final decree, the applicant filed a petition for review on two grounds, first that there was an error apparent on the face of the record in a calculation regarding his share of 37 bighas, and secondly, that nothing had been allowed to him on account of his wages or the wages of his staff employed in making collections in the zirat land. The Court on 10th January 1916 rejected the application for review. By this time the period prescribed for an appeal to the High Court had expired. An appeal was nevertheless presented on 31st January 1916 and the opposite party decreeholders were called upon to show cause why the appeal should not be registered. The applicant has to satisfy us that he had a sufficient cause for not filing his appeal within the prescribed time. He relies on the fact that he applied for review under the advice of two leading pleaders of the Darbhanga Bar and we have been referred to cases in which the High Court has allowed a deduction of the time spent in applying for a review of judgment. In all these cases it is said that the decision must depend upon the special circumstances proved in the particular case. The fact that the applicant took the advice of two pleaders of Darbhanga is not necessarily enough.

The first ground taken in the application for a review related to a small matter and even if that ground had been accepted, the applicant would not have abandoned his right of appeal. The

second ground, if allowed, would have relieved the applicant of liability to pay a considerable sum of money. We find that although the applicant lodged a large number of objections to the report of the Commissioner, the objection stated in the second ground in the application for review was not taken. It is common practice to file an appeal as well as an application for review. The applicant in the present case does not pretend that he was advised not to file an appeal when it became obvious that the application for review could not be disposed of within the time limited for an appeal. Comparing the grounds of appeal to this Court with the grounds taken in the application for review, we feel that the true reason for not filing an appeal has not been disclosed. We are not satisfied that the applicant had sufficient cause for not filing his appeal within time. The application to have this appeal registered is therefore rejected with costs. Hearing-fee two gold mohurs.

V.S./R.K.

Application rejected.

A. I. R. 1916 Patna 353

SHARFUDDIN AND ROE, JJ.

Ramkhelawan Singh — Defendant—Appellant.

v.

Sunder Raut and others—Plaintiffs—Respondents.

Appeal No. 5 of 1913, Decided on 7th April 1916, from original decree of Second Sub-Judge, Darbhanga, D/- 26th August 1912.

(a) Civil P. C. (5 of 1908), O. 21, R. 54 (2) —Attachment of immovables when complete stated—Entry in touzi register is not contemplated by R. 54 (2).

An attachment of immovable property is complete when the formalities mentioned in O. 21, R. 54 (2), are complied with. [P 355 C 2]

(b) Civil P. C. (5 of 1908), O. 21, R. 54 (2) —Fresh attachment on Collector requiring additional information for touzi register does not invalidate previous attachment.

An entry in the tauzi Register is no part of the procedure contemplated in the said rule.

[P 355 C 2]

A requisition from the Collector for additional information about the property for entry in the touzi Register is no ground for the issue of a fresh attachment, if attachment has already been made in the manner provided by the said rule. If a fresh attachment is issued it is a redundancy and does not render void the first attachment: 6 All 33 Ref.; 5 N W P H C R 70, Appr.

[P 355 C 2]

(c) Civil P. C. (5 of 1908), S. 64—Purchaser after attachment has even no lien for purchase money.

A purchase made during the pendency of an attachment is void against all claims enforceable under it and the purchaser has not even a lien on the property to the extent of the purchase money paid by him. [P 356 C 1]

Mohammad Mustafa Khan—for Appellant.

S.R. Palit and *B. N. Mitter*—for Respondents.

Roe, J.—The plaintiff in this case is Sundar Raut. He is the jamadar of Rewari Factory, which was part of the estate of E. S. Llewellyn under the management of Mr. M. H. Mackenzie as trustees to that estate. Mr. Mackenzie was, at the time of his marriage in 1889, in affluent circumstances and settled a considerable sum of money upon his bride. This money Mrs. Mackenzie has dealt with as her own and has, both in Mr. Mackenzie's own property at Rajkund and in the property at Rewari for which Mr. Mackenzie is trustee, advanced from time to time sums from her private purse for carrying on the work of these two factories. About the year 1902 Mr. Follet was manager of Rewari Factory. He also found difficulty in carrying on the factory with the sums supplied him from the estate of which he was manager. He therefore borrowed money from Mrs. Follet to the extent of some Rs. 10,000 and, under his power-of-attorney, mortgaged the factory, to Mrs. Follet as security for these advances. On his retiring from the management to Mr. Follet put pressure upon Mr. Mackenzie for the liquidation of the debt due Mrs. Follet. Mrs. Mackenzie accordingly made an advance sufficient to repay Mr. Follet, and obtained a first mortgage upon the property of the factory, including among other villages, a village of the name of Birnama. For the working expenses of the factory Mrs. Mackenzie advanced a further sum of Rs. 1,400 and took a second mortgage upon the factory property as security for this sum. The factory has of late come to its last tether. There are decrees outstanding against it for rent in all directions, and in particular a decree obtained by Ramkhelawan. In execution of this decree the village Birnama was attached and sold in due course to Ramkhelawan Singh, the appellant in this case. The plaintiff-res-

pondent pleads that this sale is void as against him by reason of the fact that he obtained from Mr. Mackenzie a deed of sale for Rs. 13,000 covering four villages belonging to the factory, one of which is Birnama and, in consideration of this deed of sale, paid to Mrs. Mackenzie Rs. 5,300 in part satisfaction of her mortgage lien upon the property.

The learned Subordinate Judge on these pleadings found every issue in favour of the respondent. He found that Mrs. Mackenzie's mortgages were genuine, that the sale to Sunder Raut was genuine, and that when that sale was completed there was, in fact, no attachment subsisting upon the property in suit. Against that decision Ramkhelawan Singh appeals. It is not strenuously urged by Moulvi Mustafa Khan for the appellant that Mrs. Mackenzie's evidence can be seriously assailed. I am of opinion that it is a clear and straightforward account of the whole of her dealings with her marriage settlement since the time of her marriage. It is to be noted that when Mr. Follet was manager he took advances from Mrs. Follet, and this in itself is corroboration by probability that Mr. Mackenzie, for the benefit of the factory, also took advances from Mrs. Mackenzie. I am satisfied that these documents are good documents for valid consideration. I am also satisfied that the sale to Sundar Raut was, for the purposes of this case, a transaction made in good faith. Sundar Raut, no doubt, was anxious to improve his position from that of jamadar of the factory to that of managing proprietor; Mrs. Mackenzie was anxious, on her side, to secure what sum of money she could from the wreck of the factory. I am satisfied that the sale to Sundar Raut was made to this extent in good faith, and that had there been no attachment upon the property, the village Birnama would have passed, out of that deed of sale, to Sundar Raut. I am not in agreement with the learned Subordinate Judge that there was no attachment subsisting upon the property.

In setting forth the dates of the various transactions I am handicapped by the respondent's failure to print in the paper book the services of second attachments, upon which he bases his claim, that the first attachment was

no longer subsisting on 14th May, the date of his sale. I have however before me a full account of the first attachment made in execution of Ramkhelawan's decree. The first application for attachment was made in April 1910, and in accordance with that application, an order was issued to Mr. M. H. Mackenzie, defendant, which will be found on p. 70 of the paper book, prohibiting him from parting with the property by purchase, gift or otherwise. This order was proclaimed upon the spot by peons on 13th April 1910, and was hung up on a conspicuous part of the Subordinate Judge's Court on 4th April 1910. On 16th April 1910, a peon hung up a copy of the attachment in a conspicuous spot of the Collectorate, and on the same date an order was sent to the Collector of the District, notifying him that the estate No. 12,822=6-annas 12 gandas 3 cowries, etc., out of the 16-annas kham putti of Mouza Birnamatolla, had been attached.

On 20th April 1910 the Collector's amla reported that, inasmuch as the estate had a separate account, the description given in the order of attachment was insufficient for notification by entry in the touzi Register. Accordingly the order of attachment was sent to the Munsif of Samastipur "for favour of needful!" On receipt of this the Munsif ordered that a fresh attachment should be served. It is asserted, and it appears from the judgment of the learned Subordinate Judge, that a fresh attachment was so served, and that, not only was the information required by the Collector sent to him, but also fresh notices of attachment served on this spot. The date of the furnishing of the Collector with the information required was 7th May. The deed of sale executed by Mackenzie in favour of Sundar Raut was dated 14th May. We are therefore asked by the respondents to hold that, in view of the fact that there was a second attachment issued upon the property, the first attachment was void, and that it cannot be said that the sale in this case arose out of the attachments which were completed on 7th May. In support of this contention the ruling in the case of *Gobind Singh v. Zalim Singh* (1) is quoted. At the bottom of p. 35 will be seen the real point

1. (1884) 6 All 33.

in issue in this case. "It is incontrovertible that the attachment of 1866-1867 expired in 1867." In this case there was no expiry of the attachments made on the 13th, 14th and 16th April. They were attachments in due form, and from the date thereof the property of the estate attached remained bound for the execution of Ramkhelawan's decree. Even supposing for the sake of argument that it was necessary to enter attachment in the touzi Register, even that was complete on 7th May. It is obvious however that the entry in the touzi Register is no part of the procedure contemplated in O. 21, R. 54.

It is sufficient that the attachment itself should be proclaimed in the Collector's office, and it cannot be denied that the description given of the property was a sufficient description within the meaning of O. 21, R. 54. The attachments were complete on 16th April; what was done afterwards was a mere redundancy. I have not been able to obtain a full report of the case quoted by Woodroffe, J., in support of the contention that mere redundancy does not nullify a previous attachment. It is that of *Mookhesur v. Ramphul* (2). But in my view the proposition is in itself obvious, that a work of supererogation on the part of the Munsif's office cannot have the effect of nullifying an attachment duly made. I am satisfied that the purchase made by Sundar Raut was made while the property was under attachment and that, within the meaning of S. 64, Civil P. C., it is void as against all claims enforceable under the attachment. I hold that the sale, at which Ramkhelawan purchased in execution of his own decree, created a claim enforceable under this attachment. Therefore the purchase of Sundar Raut is void as against Ramkhelawan. Two further grounds are taken by the respondents upon which the decision of the learned Subordinate Judge should not be disturbed. The first is that, even if the sale be declared to have been made while the property was under attachment, Sundar Raut should be permitted to settle with Ramkhelawan by payment to him of the whole sum for which the attachment was made. This relief cannot be given in the present proceedings. The suit is

2. (1873) 5 N W P H C R 70.

for a declaration that the purchase of Ramkhelawan is void as against Sundar Raut: we cannot make any order in execution of the decree of Ramkhelawan upon the basis of the present suit.

The third and last point taken is that Sundar Raut has an equitable charge upon the property and that this charge saves him from eviction. Upon this argument the relief sought is that given in the plaint,

"4, that if the Court is of opinion that it is not consistent with reason to grant relief No. 3 to the plaintiffs, in that case Rs. 5,300 paid by the plaintiff in satisfaction of a portion of the mortgage money, under the purchase made by the defendants third party, and to which the purchase made by defendants first party is subject, may be awarded from the defendants first party."

The relief asked for is that there shall be a decree for a lien upon the property in suit to the extent of the purchase money paid to Mrs. Mackenzie. It is clear that Sundar Raut's purchase is void as against the property in suit. His purchase is void as against all claims created by Ramkhelawan's purchase. No relief may be given to him in respect of any right accruing to him out of a purchase which is in itself void. Upon all the grounds argued all the reliefs sought by Sundar Raut in this case are barred by reason of the attachment, if not on 16th April, then on 7th May. The suit must therefore fail and is dismissed with costs. The appeal is decreed with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 356

CHAMIER, C. J. AND SHARFUDDIN, J.

E. G. Stonewigg — Defendant — Appellant.

v.

Sheo Rachhaya Singh and others — Plaintiffs—Respondents.

Second Appeal No. 581 of 1916, Decided on 7th July 1916, from decision of Dist. Judge, Darbhanga, D/- 28th March 1916.

(a) Bengal Tenancy Act (8 of 1885) — "Raiyat"—Meaning of.

A raiyat within the meaning of the Bengal Tenancy Act, is a person who acquires land for the purpose of cultivating it. [P 357 C 1]

(b) Bengal Tenancy Act (8 of 1885)—Lease as thekadar does not confer occupancy rights.

Possession under a lease as a thekadar and not as a cultivating tenant does not confer occupancy-rights under the Act. [P 357 C 1]

Rajendra Prasad—for Appellant.

Baidyanath Narain Sinha — for Respondents.

Chamier, C. J. — This appeal arises out of a suit brought by the respondents for the ejectment of the appellant from 25 bighas 9 cottahs 19 dhurs of land and also a separate area of 3 bighas 19 cottahs and 9 dhurs. The Subordinate Judge decreed the claim in respect of the former area and dismissed it in respect of the latter. Both sides appealed, with the result that the District Judge confirmed, the decision of the first Court as regards the former area and as regards the latter on the appeal of the respondents decreed the claim in respect of 1 bigha 3 cottahs and 12 dhurs, which is called in the judgment Paltu's holding, being part of the second area mentioned above. It appears that the respondents were proprietors of a l-anna share in the village and they had in their khas possession 30 bighas 19 cottahs and 14 dhurs of land. On 3rd November 1902, they gave the appellant a lease of the share in the milkiat and also of the 30 acres odd. The lease was to run from 1310 Fasli to 1320 Fasli and therefore it expired in 1913 A. D. The present suit was brought on 20th February 1914.

Of the 30 bighas odd, 5 bighas odd did not pass into the possession of the appellant and may be treated as not being affected by the lease. The remaining 25 bighas odd is the first area mentioned above. The appellant resisted the suit on the ground that he had acquired occupancy rights in the 25 bighas. It appears that previous to 5th January, 1901 the 25 bighas odd were held by a raiyat who is not a party to the present proceedings. That raiyat surrendered his holding to the respondents on 5th January 1901. The appellant had been a shikmi tenant of the land and seems to have remained in possession of it notwithstanding the surrender of the holding by the raiyat. It is found however that the respondents in no way recognized the appellant as their tenant and did not accept any rent from them. Prima facie therefore any possession which the appellant may have had previous to November 1902, when he obtained a lease from the respondents, may be disregarded in considering the question whether the appellant has ac-

quired occupancy rights in the land. The appellant puts his case in this way. He says that the lease of November 1902, gave him the 25 bighas odd to cultivate as a tenant and that he cultivated the land throughout the term of the lease as a tenant and up to the date of the present suit and therefore under sub-S. (7), S. 20, Ben. Ten. Act, it should be presumed, until the contrary is proved or admitted, that he held the land continuously for 12 years as a raiyat. He says that the finding of the Courts below that it is not proved that the respondents recognized him as a tenant previous to November 1902, may be disregarded as that finding assumes that the onus of proof is upon him, whereas under S. 20, sub-S. (7), the onus is upon the respondents to prove that he did not hold during that period as a tenant.

In my opinion, this question of onus of proof does not arise, for it appears to me to be quite clear that the appellant was not in respect of the 25 bighas a raiyat within the meaning of the Act, that is to say, that he did not acquire the land under the lease for purpose of cultivating it. The lease is one in the usual form containing the usual provisions to the effect that the lessee is to carry out all the orders of duly constituted authorities. It reserves one undivided rent in respect of the share in the milkiat and the 30 bighas odd which had up to that time been in the khas possession of the lessors, and provides that the lessee may either cultivate the 30 bighas himself or let it out to tenants. We have been referred to several decisions upon other leases. It is impossible to treat decisions on other leases framed in different terms as authorities for the construction to be placed on the lease now in question. In my opinion it is impossible to read the lease now in question without seeing that it was the intention of both parties that the lessee should hold not only the share in the milkiat but also the 30 bighas as thekadar and not as a cultivating raiyat. Both Courts below have come to this conclusion and, in my opinion, they were unquestionably right. I would therefore dismiss this appeal as regards the 25 bighas odd.

The case as regards the remaining 1 bigha 3 cottahs and 12 dhurs is still more clear. Paltu, who was in posses-

sion of the land, abandoned it in or about 1316 Fasli. There is nothing to show that he was restored to possession either by the respondents or by the appellant, their lessee, nor was it the case of the appellant that Paltu was restored to possession. The respondents took a mortgage of the land from Paltu after the expiry of the term of his lease and it is on the strength of this mortgage that the appellant claims to be entitled to retain the land. It is obvious that the mortgage does not entitle the appellant to retain the land. I would dismiss this appeal with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 357

SHARFUDDIN AND ROE, JJ.

Singheswar Missir—Plaintiff—Appellant.

v.

Rameshwar Jha and others—Defendants—Respondents.

Appeal No. 220 of 1913, Decided on 25th April 1916, from Original Decree of Sub-Judge, Darbhanga, D/- 3rd August 1911.

(a) **Hindu Law — Partition — Burden of proof—Partial partition—Effect — Burden is on plaintiff that property in suit was not partitioned.**

In a suit for partition, if it is clear that there has been a partial partition, the burden of proof is on the plaintiff to show that there has been no partition of the properties of which partition is claimed [P 359 C 1]

(b) **Hindu Law—Partition — Adverse possession on proof of partial partition — Defendant can set adverse possession.**

It is also necessary that the plaintiff should show that he was either in possession at the date of suit or within 12 years prior to it. Adverse possession by defendants for 12 years prior to the institution of the suit bars the claim. [P 359 C 1]

(c) **Practice — Pleadings — Possession by himself pleaded in suit—Possession through cosharers cannot be pleaded in appeal.**

When the plaintiff makes a definite case of possession by himself in the plaint, he cannot be allowed to make in appeal an entirely new case of possession through cosharers in order to save the bar of limitation. [P 360 C 2]

(d) **Practice—Judge—Court cannot set up a new case not pleaded.**

It is extremely dangerous for a Court to arrive at a conclusion which is not in accordance with the case of either side, and each case must be fought upon the pleadings. [P 358 C 2]

Ganesh Dutt Singh—for Appellant.

Sorashi Charan Mitter—for Respondents.

Judgment.—This is an appeal from the decision of the Subordinate Judge of Darbhanga, dismissing the suit of the plaintiffs for partition. Plaintiff 2 is the widow of Dukha Jha, who died in 1891. He had two brothers, named, Chandeshwar Jha and Porander Jha. These brothers are also dead, their interests being represented by their sons Rameshwar Jha and Kedar Nath Jha, who are recorded in the finally published Record of Rights as in possession of the property in dispute. This property, as set forth in the schedule attached to the plaint, consists of a tenure in Lohna shown in Khewat No. 21, a tenure in Kishenpatti shown in Khewat No. 3 and tenures in Lohna shown in Khewats Nos. 13, 32 and 33. The Kishenpatti tenure is a rent-free barh mot-tar tenure. A half share of the interest of plaintiff No. 2 in the Kishenpatti tenure was sold to plaintiff 1 for a thousand rupees, paid in cash, and a promise to expend not less than Rs. 3,000 in securing the property to plaintiff 2. The suit is for a partition of the properties named in the plaint.

The allegation of the plaintiffs is that though there had been separation in mess from before the time of the death of Dukha, there had been no partition by metes and bounds of the property in dispute. The defence to the case, as put forward in the lower Court by the principal defendants-mortgagees of the whole property in dispute, was that the three brothers Dukha, Chandeshwar and Porander were never separated, and that therefore under the Mitakshara Law Chandeshwar and Kedar Nath succeeded to the property by survivorship on the death of Dukha. The learned Subordinate Judge has found as a fact that the defence is a false defence, that there was a separation in mess between the three brothers before the death of Dukha, and therefore the widow would in due course, have been entitled to succeed. But he also found that, from the time of the death of Dukha, the debts outstanding against him were settled by his two brothers, and that, in consideration of that settlement, the widow abandoned all rights in the property. He also found that there had, in fact, been a complete partition by metes and bounds of the whole property, and that therefore the suit must fail. Against that

decision the plaintiffs appealed. During the pendency of the appeal Singheswar Missir, plaintiff 1, came to terms with the principal defendants - mortgagees who had acquired, by auction-purchase in execution of decrees upon their mortgages, the estates of Rameshwar and Kedar Nath. He executed an "ekrar-nama" disclaiming all rights in the property.

An attempt was made to make plaintiff 2 a party to this "ekrarnama." That attempt failed, and she remains on the record as an appellant. In appeal before us the arguments advanced are, (1) that the Subordinate Judge acted without jurisdiction in dismissing the plaintiffs' suit on a defence not taken in the written statement, (2) that there was in fact no separation by metes and bounds of the property now claimed, and (3) that the question of abandonment of the lands by plaintiff 2 was not one raised by the parties at any stage of the proceedings, that it was entirely an effort of the imagination on the part of the lower appellate Court, and that the true facts are that plaintiff 2 entrusted the management of her affairs to Rameshwar Jha and Kedar Nath after her husband's death and that they were in possession of the property, if in possession at all, as trustees for plaintiff 2 and that therefore no limitation could arise out of their possession of the property. In answer to this argument the learned vakil for the respondents, as though he had filed a cross-appeal against the decision that there had been a separation in mess between Dukha and his brothers, supports the lower Court's decisions on all points. In answer to the argument that the lower Court had no jurisdiction to entertain a defence not pleaded, it was urged that the contesting defendant was a stranger to the village and was not in possession of the true facts, that it was the duty of the plaintiff to put the Court in possession of the true facts, and that when upon the evidence upon the record the lower Court came to a finding of fact which must result in a dismissal of the plaintiff's case, the lower Court was justified in so dismissing it. That each case must be fought upon the pleadings, is in general a sound rule. It is extremely dangerous for any Court to arrive at a conclusion which is not in accordance with the case of either

side. But in a suit for partition the burden of proof is on the plaintiff, if it is clear that there has been a partial partition, to show that there has been no partition of the properties of which partition is claimed.

It is also necessary that the plaintiff should show that she is either in possession at the time of the suit or has been in possession within 12 years. If it is shown that possession has been held adversely against her for 12 years prior to the institution of the suit, her suit must fail. Moreover in the suit before us issue 4 runs, "Is the suit barred by limitation."

Upon the first question of fact whether or not the property is still joint, it is clear that the decision of the learned Subordinate Judge is in part only correct. It is not correct to say that the Kishenpatti property was divided. Both sides are agreed and the Survey Records show that it was never divided. The property in suit we have already described; in addition to this property Ex. 1 shows that Dukha was in separate possession of a one-third share of 25 bighas in village Hata Rupowli. He was also in possession of 7 bighas out of 15 bighas in Lohana. The family had also milkiat in village Mekan Baida. None of these properties are mentioned in the plaint. It is, therefore, to be presumed that they were separately held at the time of Dukha's death. That they were separately held is clear from the fact that in the finally published Record of Rights the plaintiff Sankari Ojhain is recorded as in sole possession of 8 bighas in Hata Rupowli. Of the lands mentioned in the plaint, it is also certain that there must have been before 1901 a separation of shares in the four Lohna tenures. The Survey Record shows that of Khewat No. 21 of Lohna composed of Khatas Nos. 694 to 753: 694 and 695 are separately recorded as bakasht respectively of Kedar Nath and Ramji; and in Khewats Nos. 13, 32 and 33 of Lohna, consisting of Khatas Nos. 509 and 530 to 569, 509 is the bakasht of Kedar Nath Jha and 530 is the bakasht of Ramji Jha.

It is quite certain, therefore, that in the private lands of these khewats in Lohna there was separation by metes and bounds prior to 1901. And we find from the evidence of Singheswar Missir

that he claimed to be, with his vendor, in separate possession of 20 bighas of bakasht land. Great stress was laid in the arguments before us upon Exs. 17 and 18 as showing that 72 bighas in Lohna and 210 bighas in Kishenpatti were always jointly held. This argument was based upon the fact that in Exs. 17 and 18 Rameshwar and Kedar mortgaged by separate deeds each an unspecified 36 bighas out of 72 bighas in Lohna and 140 bighas out of 210 bighas in Kishenpatti. Exs. 17 and 18 are dated June 1902. If it be shown that there was complete separation in Lohna between Chandeshwar and Kedar Nath before 1901 when the Record of Rights was finally published, Exs. 17 and 18 are valueless as evidence that there was no separation in Lohna when these two documents were made. We have shown that in the lands held bakasht by the brothers there must have been separation by metes and bounds many years ago. In Ex. 12, whereby Chandeshwar and Kedar Nath are giving in sudhbarna 7 bighas of Lohna the lands are described as east of the patti of Dukha and west of the patti of Dukha; other boundaries given in this document are not pattis, but lands or fields or kasht lands of the various neighbouring holders. The word patti there used is significant, and is, when added to the other evidence of separation in Lohna, conclusive proof that in Lohna Dukha had a separate patti. No suit for a partition of the Lohna lands can lie.

The remaining property is that of Mouzah Deohar, Tola Kishenpatti, Khewat No. 3. In this village there are no bakasht lands. No arrangement had been arrived at by the brothers whereby each collected one-third of the rent from the tenants. It is the case of both sides that there the patwari collected the rents in one lump from the tenants, and divided between the three sharers the sum collected. The Kishenpatti property is clearly joint and should be divided if the widow of Dukha has not lost by limitation her claim to partition.

On the question of limitation the plaintiff's case was that the plaintiff 2 Sankari Ojhain paid up her husband's debts by selling paddy, and was in actual possession of her husband's property up to the date of the suit by re-

ceipt of batai rents from the Lohna lands and by receipt of Rs. 200 per annum as her share of the rents of the Kishenpatti lands. All this is entirely untrue. The documents on the record show clearly what was the position of Dukha's affairs at the time of his death. Exs. 1 and 2 are mortgages made by Dukha of some 15 bighas of land. Exs. 3, 13 and 14 show that a decree was obtained, including costs, for Rs. 598 upon these debts. Ex. D shows that Dukha and Chandeshwar were jointly indebted to the extent of Rs. 1,100 by a mortgage upon the Kishenpatti tenure, and Ex. C shows that Dukha and Chandeshwar again mortgaged this Kishenpatti tenure for Rs. 1,572 on 19th December 1890. These debts were unpaid at the time of Dukha's death. Ex. K shows that on 14th September 1893 Chandeshwar and Kedar Nath gave a sudhbarna of Mikan Baida for Rs. 4,000 and with that money paid up all Dukha's debts, including the mortgage upon the Kishenpatti tenure. Ex. I shows that on 7th June 1906 Rameshwar, the son of Chandeshwar, sold 2 annas 13 gandas 1 cowri 1 karant of Mikan Baida to pay off his Rs. 2,000 in the sudhbarna. Ex. 20 shows that each brother had a 1-15-2-0-2 share in Mikan Baida, of which Dukha had in his lifetime sold 0-17-3-0-1. Kedar Nath got himself recorded in Register D for the shares of Poronder Jha and Dukha Jha, 2-13-1-1 of Mikan Baida, on 18th December 1903 and then sold his own milkiat and Dukha's milkiat to pay off the sudhbarna. Thus all Dukha's liabilities were cleared by the sale of Mikan Baida, not by the sale of paddy by the widow.

In the alienation of Mikan Baida the widow acquiesced, and still acquiesces. Mikan Baida is not one of the properties of which she asks for partition. She allowed Rameshwar and Kedar Nath to plough the Lohna lands. What she did with regard to Kishenpatti it is impossible to say. It was not till 1903 that she appointed any one to look after her interests in her husband's estate. The man she then appointed was Sashi Nath Jha. This person's evidence and Sankar's evidence are entirely unworthy of belief. The widow was paying rent for the mokarari lands of Lohna. Rameshwar and Kedar Nath were hopelessly hard pressed for money. It is very im-

probable that they even sent the widow anything. All payments received by the widow are said to have been entered in account books. All these accounts are said to have been burnt; all the road-pass receipts are said to have been burnt; Bajrangi who carried to the widow's house her share of the collections is not called as a witness. We are satisfied that it is untrue that plaintiff 2, Sankari Ojhain, has any sort of possession in the Kishenpattilands from the date of the death of Dukha to the present day.

It may be mentioned in this connexion that she was a second wife. There were two daughters living by the first wife. She had only lived one year with Dukha when Dukha died. We find in all the evidence in the case ample justification for the finding of the lower Court that the plaintiff has been out of possession for 12 years prior to the institution of the suit, that she left her husband's home on her husband's death, and received no profits from the estate from the day of his death. She allowed herself to be ousted at the time of her husband's death in 1891.

It is argued that this is not sufficient to establish limitation. In support of the argument is quoted the well-known rule that possession by co-sharers is not adverse until some overt act has been committed in denial of the title of the ousted cosharer. There was at least one such overt act committed in 1893 when Kedar Nath and Chandeshwar gave away Mikan Baida in sudhbarna. Apart from this we hold that it is impossible for us to consider the case as one in which two cosharers have been holding land in trust for all. The plaintiff made a definite case of possession by herself. She cannot be allowed to make in appeal an entirely new case of possession through cosharers. We hold that the suit was barred by limitation and was rightly dismissed. The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 361

CHAMIER, C. J. AND SHARFUDDIN, J.
Sahdeo Lal Bhagat and others—Plaintiffs—Appellants.

v.

Kesho Mohan Thakur and others—Defendants—Respondents.

Second Appeal No. 1468 of 1915, Decided on 28th June 1916, from decision of Addl. Sub-Judge, Bhagalpur, D/- 23rd March 1915.

Specific Relief Act (1 of 1877), S. 42—Dispossession from streamlet, explained—Temporary disturbance of possession—Suit for declaration maintainable.

An attempt to confer a right to catch fish in a streamlet on third persons, or the fact that some persons have caught fish in the streamlet does not amount to dispossession of owners from the streamlet. [P 361 C 2]

A mere temporary disturbance of possession is no bar to a suit for a declaration. [P 362 C 1]

Naresh Chandra Sinha—for Appellants.

Mohan Ganguly—for Respondents.

Chamier, C. J.—The plaintiffs and defendants second party are the proprietors of a village called Pararia. Defendants first party are the proprietors of a village called kasba. Between these two villages there flows a small streamlet which is called the Kalia. The object of this suit was to obtain a declaration that so much of the streamlet as lies on the eastern boundary of Pararia is within and forms part of that village. The plaintiffs alleged that the lands of Pararia have always been irrigated with water obtained from the Kalia. They further alleged that 'in or about 1320 Fasli the defendants first party wished to take water from the streamlet but the appellants refused to allow them to do so. At that time defendants first party alleged that the streamlet lay within the boundaries of the village Kasba and the plaintiffs then discovered that the streamlet had been shown in the survey map as lying within the village of Kasba. Defendant first party denied all the material allegations of the plaintiffs. They said that the portion of the streamlet in dispute lay entirely within the village Kasba and that proprietors of Pararia had not been in possession of it within 12 years of the suit. They also denied that the water of that portion of the streamlet had ever been used for irrigating the lands of Pararia. The Munsif struck 9 issues.

On issue 7 he found that the disputed

portion of the streamlet lay within Pararia, but he also found that the possession of the plaintiffs had been disturbed because some persons acting under or on behalf of some of the defendants had taken fish from the streamlet. He dismissed the suit on the ground that the plaintiffs might and ought to have claimed further relief and were not entitled to a mere declaration. On appeal the Additional Subordinate Judge dismissed the suit on the ground that the plaintiff's possession had been disturbed in the manner above mentioned, therefore they could not sue for a declaration only. He did not even record a finding that the plaintiffs had established their possession or their title. He apparently assumed these two points in their favour but dismissed the suit on the ground that a claim for mere declaration was not maintainable even if the plaintiffs had established title and previous possession.

We must dispose of this case on the assumption that plaintiffs have proved their title to Pararia and also that they were previously in possession of Pararia and of the streamlet. The question is, whether the proved fact that some persons have taken fish from the streamlet shows that the plaintiffs have been dispossessed and are therefore not entitled to sue for a mere declaration of title. All that the Additional Subordinate Judge says on the question of dispossession is:

"There can be no doubt that the plaintiffs' possession has been disturbed, that is to say, the defendants' people have caught fish in the disputed portion of the river."

The Munsif went into the matter somewhat more fully and it would appear from his judgment that the defendants first party on two occasions granted the right to catch fish in the streamlet to other persons not parties to the suit. Defendants first party may have attempted to confer on other persons the right to catch fish in the streamlet. Such an act would not amount even to disturbance of possession, still less to dispossession, nor in my opinion does the fact that some persons have at times caught fish in the streamlet show that the plaintiffs have been dispossessed. At most the catching of fish in the streamlet would be a disturbance of possession. From the findings it would ap-

pear that the disturbance was only temporary. In my opinion the Courts below were wrong in finding that a suit for declaration could not be maintained merely because some persons not before the Court had caught fish in the streamlet. I would allow this appeal, set aside the decree of the lower appellate Court and remand the case to that Court to be restored to the pending file and disposed of in accordance with law. The costs of this appeal will be costs in the cause.

Sharfuddin, J.—I concur.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 362

MULLICK, J.

Jiwach Raut—Plaintiff—Appellant.

v.

Sumran Manwar—Defendant—Respondent.

Second Appeal No. 1921 of 1914, Decided on 25th April 1916.

Execution—Purchaser—Suit—In suit for possession by execution purchaser burden of proof that decree was fraudulent or sale was irregular is on judgment-debtor.

Plaintiff, the assignee of a decree, brought the judgment-debtor's property to sale in execution and purchased it himself. After obtaining the sale certificate he instituted the present suit for possession against the judgment-debtor. The defendant pleaded that the decree was obtained by fraud and that the sale was held without service of the usual notice on him :

Held : that as the plaintiff had obtained a sale certificate from Court, the onus lay on the defendant of proving his allegation. [P 362 C 2]

Kulwant Sahay for Lakshmi Narain Singh—for Appellant.

Baikuntha Nath Mitter and Naresh Chandra Sinha—for Respondent.

Judgment.—One Abdul Gafoor in 1895 got a decree in the Small Cause Court against the defendant in the present suit. He assigned that decree to the plaintiff, who in 1900 caused the land which is now in suit to be sold in auction and purchased it himself for Rs. 32. On 14th March 1901 the plaintiff got out a sale certificate of his purchase. He did not bring the present suit till 9th October 1912. The defendant pleaded that Abdul Gafoor's decree was without his knowledge and without service of summons and that the sale at which the plaintiff had purchased was brought about without service of the usual notices. The learned District Judge affirming the decree of the Munsif has dismissed the plaintiff's suit ; hence the present second appeal by the plaintiff.

It is clear that the learned District Judge has made an error in law in making the following observations with regard to the plaintiff's case :

"It was contended for the appellant that his title is proved by the sale certificate, but in view of the defence that the execution proceedings were without the knowledge of the defendant he must prove that these proceedings were legal. The mere presumption of the regularity of official acts is not sufficient."

The plaintiff having obtained a sale certificate from Court the onus was clearly upon the defendant to prove that he was not bound by the decree. It would seem from the judgment of the learned Munsif that in that Court the finding was that the plaintiff had suppressed not only the summons but also the sale notices, that is to say, the Munsif thought that the defendant had proved that the decree had been obtained by fraud. If the learned District Judge intends to affirm that finding he must do so after placing the onus upon the correct shoulders. His judgment as it stands would seem to show that he has placed the onus entirely upon the plaintiff. That of course, is wrong. The defendant must show affirmatively that the fraud which he pleaded was committed. As to what amount of evidence is necessary to establish that fraud is a matter entirely for the trying Judge. The case must therefore go back for a re-hearing with reference to the above observations. It has been contended by the learned vakil for the respondent that the judgment of the Court below might be supported on the ground that the present suit is not maintainable by reason of the provisions of S. 47, Civil P. C., which requires that plaintiff should apply to the Court for delivery of possession and that he cannot be allowed to ask for possession by bringing a separate suit. Now the authorities upon this point are conflicting and I am informed by the learned vakil that the matter has been referred to a Full Bench of this Court. But it is sufficient for our purposes in the present appeal to observe that although in the written statement there is a general allegation that the suit is not maintainable, this particular ground that the suit is not maintainable because of S. 47, Civil P. C., has never been advanced in any of the Courts below. I do not therefore think that in second appeal I ought to allow

the parties to raise it. If at the time of re-hearing the District Judge agrees to allow the parties to raise the point they will be permitted to raise it. The result is that the appeal will be decreed and the case sent back to the lower appellate Court for re-hearing. Costs will abide the result.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 363

ATKINSON AND JWALA PRASAD, JJ.

Ram Charan Mahato — Plaintiff—Appellant.

v.

Harihar Mahato — Defendant—Respondent.

Second Appeal No. 256 of 1916, Decided on 6th July 1916, from decision of J. C., Chota Nagpur, D/- 11th December 1915.

(a) **Impartible Estate — Chota Nagpur Estate—Custom of primogeniture and impartibility exists.**

In the estate of Maharaja of Chota Nagpur and in his family the custom of impartibility and primogeniture exists. [P 364 C 1]

(b) **Appeal—Duty of Appellate Court explained—Conclusions of fact drawn by trial Court—Wrong application of law—Appellate Court will intervene and correct erroneous principles of law and remand case for re-hearing with correct exposition of law.**

A Court of Appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states, and wrongly states, what the law is and applies wrong legal principles to the facts of the case so stated by him, then in such cases the Appellate Court will intervene and correct the erroneous principles of law which the Judge has applied and remand the case for a re-hearing with a correct exposition of the law. [P 363 C 2; P 364 C 1]

Atul Krishna Ray—for Appellant.

Dhirendra Nath Dutt and Sarat Chandra Mukerjee—for Respondent.

Atkinson, J.—This case comes before us on appeal from the Judicial Commissioner of Ranchi, and the appeal is brought by the plaintiff, who seeks a partition of joint family property. The defendant is his eldest brother, and the defendant alleges that the custom of primogeniture prevails in their family in Chota Nagpur, and that consequently the joint family property is incapable of partition and descends to him, the defendant, as the eldest male heir of their common ancestor. The case was very exhaustively heard by the Subordinate

Judge and also by Mr. Kingsford sitting as Judicial Commissioner. The question that was considered was, whether proof of the custom alleged had been given, sufficient in law to satisfy the requirements of legal proof of custom. Kingsford, J., in considering the case originally admitted in evidence a report of the Settlement Officer, Mr. Roy. The learned Judge, under what he believed to be the authority of a section of an Act of Parliament, relied upon that document as being conclusive evidence of the custom alleged in this case. On second appeal the High Court of Calcutta expressed its opinion that the learned Judge was wrong, and remanded the case to him for determination, as to whether or not the custom alleged had been proved, with a direction to disregard and attach no weight to the Assistant Settlement Officer's report which the Judge had relied on so strongly in the previous trial. Kingsford, J., then applied himself to the evidence as given before him, and to the documents on the record, and satisfied himself that the custom alleged did prevail. He says in his judgment :

“ Upon the evidence on the record I am satisfied that the custom of primogeniture prevails in the family to which the parties belong, and accordingly I allow the appeal.”

Mr. Ray has very properly argued and contended before us, that the judgment of the learned Judge is not satisfactory, inasmuch as the Judicial Commissioner does not show by his judgment that he has applied legal principles in testing the value of the evidence in proof of the custom alleged. Mr. Ray says that he, the Commissioner, should have found that the custom was invariable, that it was ancient, certain, unambiguous and continuous; and he says, that because he has not separately found each one of these issues therefore it cannot be said that he has applied legal principles to the evidence given before him. In my opinion a Court of Appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states, and wrongly states, what the law is, and applies wrong legal principles to the

facts of the case so stated by him, then in such cases the Courts have held that the Judge has misdirected himself, and that therefore the High Court on appeal intervenes and corrects the erroneous principles of law which the Judge has applied, and remands the case for rehearing with a correct exposition of the law.

Taking the Subordinate Judge's judgment in this case, which was before Kingsford, J., and his own judgment in the case, I am perfectly satisfied that all the legal elements constituting proof of custom were fully present to Mr. Kingsford's mind, and with this knowledge he decided the facts against the plaintiff and in favour of the defendant, who was seeking to establish proof of custom. I am strongly fortified in the view I hold in this case, inasmuch as in the recent number of the Patna Law Journal in the case reported at p. 109, Vol. 1, for the month of June [*Lal Gajendra Nath Sahi Deo v. Lal Mathurlal Nath Sahi Deo* (1)] Chapman, J., and myself had to consider the question as to whether the rule of primogeniture was a custom recognized and established in the Province of Chota Nagpur. We were both satisfied beyond all doubt, that on the Maharaja's estates and in his family the custom of impartibility and primogeniture was established in all cases. I went a little further and held that it was the *lex loci* of the Province; I may have been right or I may have been wrong; but in the present case the parties hold their estate and family property under the Maharaja; therefore if the decision which we gave and to which I have referred, is right, it follows obviously that the family property in question was subject to the custom which we have held to be established. For all these reasons we are of opinion that there is no ground for setting aside the learned Judge's judgment. We accordingly refuse the appeal but without costs.

Jwala Prasad, J.—I entirely agree with my learned brother that the judgment of the learned Judicial Commissioner is quite right. His finding upon custom is based upon legal and sufficient evidence in the case. The learned Vakil for the appellant has failed to show that the learned Judicial Commissioner dis-

1. (1916) 1 P L J 109=35 I C 383.

regarded any evidence material in the case as to the proof of the custom, or has acted upon any illegal evidence.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 364

MULLICK AND ROE, JJ.

Kheyali Prasad — Plaintiff — Appellant.

v.

Nazarul Alum and others—Defendants—Respondents.

Second Appeal No. 2360 of 1913, Decided on 26th April 1916.

(a) **Mahomedan Law—Pre-emption—Essentials—Ceremony of talab-i-mowasabat is indispensable.**

The right of pre-emption cannot be exercised unless the pre-emptor has performed the ceremony of talab-i-mowasabat immediately on hearing of the sale. [P 367 C 1]

(b) **Mahomedan Law—Pre-emption—Requirements—Talab-i-mowasabat and Talab-i-istishhad can be combined but latter must refer to performance of former.**

Per *Mullick, J.*—The two ceremonies of talab-i-mowasabat and talab-i-istishhad can be combined, but it is essential that the talab-i-istishhad should refer expressly to the talab-i-mowasabat as having been duly made. [P 366 C 1]

(c) **Mahomedan Law—Pre-emption—Requirements—Application to stay registration does not satisfy.**

A petition to the Registrar asking for stay of registration is not a sufficient compliance with Mahomedan law in the matter of the performance of the two talabs. [P 366 C 1]

(d) **Mahomedan Law—Pre-emption—Requirements—Transfer must be complete and effected according to law.**

A sale is not complete for the purposes of pre-emption till legal ownership passes from the vendor to the vendee. Whether or not there has been payment and delivery, the pre-emptor's title in the case of property worth more than Rs. 100 does not accrue till after registration: *A I R 1914 Cal 234, Appr.* [P 366 C 1]

(e) **Mahomedan Law—Pre-emption—Mahomedan law of sale—It should not be applied.**

It is against equity, justice and good conscience to apply to a pre-emption case the Mahomedan law of sale, which is no longer in force and to attach to a mere contract for sale an incident which Mahomedan lawyers intended to attach only to an actual sale: 35 *Cal* 575; 22 *All* 343; 7 *All* 482 and 16 *All* 344, *Ref.* [P 366 C 1]

(f) **Mahomedan Law—Pre-emption—Requirements—Real sale and knowledge are essential—Pre-emptors need not wait for registration of deed.**

Per *Roe, J.*—The test to determine when right to pre-emption accrues is (1) has there been a real sale, (2) at what date had the pre-emptor knowledge that the sale was complete. If the sale is in the eyes of the contracting parties and the pre-emptor complete, it is not necessary for the pre-emptor to wait till registration before performing the ceremony of mowasabat. [P 366 C 2]

Sivanandan Roy—for Appellant.

Mullick, J.—(25th April 1916).—The plaintiff, the pre-emptor, is a Hindu. The first party defendant are the vendees and defendant 4, the second party defendant, is the vendor. The plaintiff sues to enforce his right of pre-emption in an estate of which he and defendant 4 are cosharers and in which defendant 4 has sold his share to the first party defendants. That the plaintiff though a Hindu, is entitled to pre-empt has not been disputed. The learned District Judge finds that the sale was complete under the Mahomedan law on 14th July 1911 on which day the kabala was executed. The plaintiff's story is that he came to hear of the sale at 6 a. m. on 17th July 1911, and that he immediately performed the talab-i-mowasabat; that he then went with the witnesses to the houses of the vendee and the vendor, and also to the land sold and performed the talab-i-istishhad: and that about 3 p. m. he went to the Registry Office and put in a petition before the Sub-Registrar praying that the registration of the sale-deed might be stayed. The learned District Judge does not find when the plaintiff came to know of the sale, but he finds as a fact that the plaintiff never made either the talab-i-mowasabat or the talab-i-istishhad, and disagreeing with the Subordinate Judge he has dismissed the suit. Hence this second appeal by the plaintiff.

The contention of the learned vakil for the appellant is that the sale was not complete till registration of the sale-deed and that the petition made to the Registrar constitutes a sufficient performance of both demands. Now under S. 37, Act 12 of 1887, it is clear that there being no special custom pleaded the case must be tried on the principles of justice, equity and good conscience. According to the Allahabad High Court these principles require that not only the Mahomedan law of pre-emption should be applied but also the Mahomedan law of sale, which has confessedly been altered by S. 54, T. P. Act.

Therefore it has been held by that Court that the right of pre-emption arises as soon as there has been a complete sale by unconditional offer and acceptance, and that if consideration has been paid and possession transferred,

registration of the sale-deed is not necessary, at all events if the formality was intentionally omitted in order to defeat pre-emption and if the circumstances are such that the purchaser could have obtained the legal ownership by means of a suit for specific performance: *Najm-un-nissa v. Rajaib Ali Khan* (1); *Janki v. Girjadat* (2), (Mahomood, J., dissenting); *Begam v. Muhammad Yakub* (3) (Banerji, J. dissenting). The Calcutta High Court have however expressed doubts as to the soundness of these decisions. In *Jadu Lal v. Janki Koer* (4), though not definitely deciding whether the sale became complete on the execution of the sale-deed or upon registration, a Bench of two Judges of that Court were of opinion that there were difficulties in applying the Mahomedan law of sale strictly and that the real solution depended in each case on the intention of the parties. The objection to this test is that it seems inequitable that the rights of the pre-emptor should depend on his ability to discover what the vendor and vendee had in their minds at the time of the execution of a conveyance to which he was not a party.

In *Budhai Sirdar v. Sonaulla Mridha* (5), however Carnduff, J., expressed a more decided view. He was of opinion that S. 54, T. P. Act, had abrogated the Mahomedan law of sale and that the pre-emption right did not accrue till after registration. He dissented from the decision of the Allahabad Court in *Janki's* (2) and *Begum's* (3) cases so far as they decided that the Mahomedan law of sale should be strictly applied. In the case before him there was neither payment of consideration nor delivery of possession till registration, and he was satisfied that it was in accord with the spirit of the Mahomedan law to hold that the sale became complete for the purposes of pre-emption only upon registration. In the same case Richardson, J., while agreeing with the decree of Carnduff, J., expressed the view that the application of the Mahomedan law of sale presented great, if not insuperable, difficulties and he was inclined to accept the test suggested by Brett, J., in

1. (1900) 22 All 343.

2. (1885) 7 All 482.

3. (1894) 16 All 344.

4. (1908) 35 Cal 575.

5. A I R 1914 Cal 234=41 Cal 943=23 I C 385

Jadulal's case (4), with the addition that the intention of the parties must be manifested in some unequivocal way such as delivery of possession or registration.

Adopting the reasoning of Carnduff, J., and of Sir Roland Wilson at p. 412 of Edn. 4 of his "Digest of Anglo-Mahomedan law," I would hold that as the sale is not complete till legal ownership passes, no matter whether there has been payment and delivery, the pre-emptor's title in the case of a property worth more than Rs. 100 does not accrue till after registration. It seems to me that it would be against equity, justice and good conscience to apply in the case before us the Mahomedan law of sale, which is no longer in force and to attach to a mere contract for sale an incident which the Mahomedan lawyers intended to attach only to an actual sale. Turning now to the facts before us, it would seem from the pleadings that the parties were agreed that payment of consideration and delivery of possession had taken place before the 17th July, which was the date of registration. The case made by the plaintiff in the Court of first instance was that the sale was complete on the 14th July and that he formed the talab-i-mowasabat as soon as he learnt of the sale at 6 a. m. on the 17th July in the shop of a sweet-seller. That case has been found to be false.

The learned vakil for the appellant cannot challenge that finding but he now makes a new case. He contends that as the sale only became complete upon registration, the petition which the plaintiff made in person to the Sub-Registrar was a sufficient compliance with the law in the matter of the performance of the talab-i-mowasabat and talab-i-istishhad. Now what is that petition? It does not make any reference to the talab-i-mowasabat. No doubt the two formalities can be combined, but it is essential that the talab-i-istishhad should refer expressly to the talab-i-mowasabat as having been duly made. This the plaintiff did not do. There is not a word in the petition about any talab-i-mowasabat. I cannot admit that the petition complies with the requirements of the Mahomedan law in the matter of the two talabs, although it was made in the presence of witnesses and in the presence of the vendor. That being so, the plain-

tiff has no right to pre-empt and the suit has been rightly dismissed.

Roe, J.—I agree that the appeal should be dismissed. In my view there is not that divergence in the rulings quoted in this case, which it has been suggested by the learned vakils on either side exists. The test in each case should be, firstly, has there been a real sale; secondly, at what date had the pre-emptor knowledge that the sale was complete. In the case of *Budhai Sirdar v. Sonaulla Mridha* (5) it was clear that the sale was not complete at the time when the pre-emptor performed the ceremonies of mowasabat; no consideration had passed, and the vendor was, in spite of the sale to Budhai, still negotiating for a sale to Sonaulla. In the case of *Jadu Lal v. Janki Koer* (4) the judgment of Brett, J., shows that what was weighing chiefly in his mind was the question of fact, at what particular moment Mr. Lewis knew of a sale to Jadu Lal Sahu. This is clear from pp. 586 to 589 of the judgment. It will appear that in that case also Amirul Hussain, the agent of the vendor, was, in spite of the intended sale to Jadu Lal Sahu, negotiating through Mr. Irwin with Mr. Lewis for a sale to the Bettiah Raj. In these two cases the pre-emptor could not be certain that the sale was complete until registration had actually been effected. In the case of *Begam v. Muhammad Yakub* (3) there had been a complete sale within the meaning usually attached to a sale by Mahomedans. It was held in that case that the sale in the eyes of the contracting parties and of the pre-emptor being complete, it was not necessary for the pre-emptor to wait till registration before performing the ceremony of mowasabat. That is the test that I would apply to the present case. Was the sale in the eyes of the parties complete? In para. 7 of the plaint we find the following sentence:

"On that very day (the 17th July) while he was at Sheikhpura he all of a sudden learnt that the defendant second party, had really sold, by a deed of sale, dated the 14th July, his shares in Mouzas Belchhi, etc."

The plaintiff's case therefore, as set forth in the pleadings, was that he knew that there had been a sale which was in his eyes complete, and that this knowledge came to him on the 17th July while he was at Sheikhpura. He was therefore required by the law of pre-emption

to perform the ceremonies of mowasabat immediately. The case is that he did so perform those ceremonies immediately. He cannot now change the nature of his case. It has been found as a fact by the learned Subordinate Judge that he did not perform mowasabat immediately upon obtaining knowledge of the sale. He cannot be permitted to argue that he was not aware that the sale was complete until after registration was effected. I agree that the appeal should be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 367

CHAMIER, C. J. AND SHARFUDDIN, J.
Mahadeo Prasad Sahu—Appellant.

v.

Ram Chandar Narain Singh—Respdt.

First Appeal No. 396 of 1914, Decided on 4th July 1916.

Limitation Act (1908), S. 15, Sch. 1, Art. 182—Execution of decree neither stayed by injunction or order — Decree-holder neither prevented by force or fraud to execute decree — Application presented more than three years after dismissal of last application is barred—Application in continuation of former application—Applicability.

Where the execution of a decree has not been stayed by injunction or order, and the decree-holder has not been prevented by force or fraud from executing it, an application for execution presented more than three years after the dismissal of the last application is barred by time.

The principle that the Court may treat an application *prima facie* barred by limitation as an application made in continuation of an application which has been dismissed, can be applied only to those cases where the decree-holder has not been remiss: 18 I C 841, *Dist*; 32 I C 931, *Ref.* [P 367 C 2; P 368 C 1, 2]

Hasan Imam, Jayaswal and Saroshi Charan Mittra—for Appellant.

S. Sinha and Kulwant Sahay—for Respondent.

Chamier, C. J. — This is an appeal against an order of the Subordinate Judge, First Court, Muzaffarpur, dismissing an application made by the appellant for execution of a decree, passed on 14th December 1903. The first application for execution was presented in 1906 and was struck off on 15th November 1906. Meanwhile on 14th November 1906, a suit had been brought by the judgment-debtor to have the decree set aside on the ground of fraud. On 8th June 1908, that suit was dismissed. On 6th July 1908, an application was made to the Court to restore that case to the pending file. That application was dis-

missed on 29th August 1908. On 23rd September 1908, another application was made for execution and on 16th January 1909, an order was made with reference to that application bringing on to the record the names of the representatives of a deceased party. On 8th February 1909, that application for execution was struck off for default. Meanwhile on 26th November 1908, the judgment-debtor had appealed to the High Court against the order of 29th August 1908, dismissing the application for restoration of the case. On 8th July 1910, the appeal was allowed and the case was remanded by the High Court to the Subordinate Judge and on 8th May 1912, the Subordinate Judge again dismissed the suit. The application for execution out of which this appeal arises was presented on 5th March 1914. The decree-holder claims to be entitled to deduct the period that elapsed between 8th April 1909, and 8th May 1912. The former was the date on which the decree-holder received notice that the judgment-debtor had filed an appeal to the High Court against the order of 29th August 1908.

If the decree-holder is allowed to deduct the time that elapsed between the date on which he received notices of the appeal to the High Court and the date on which the Subordinate Judge dismissed the judgment-debtor's suit after the remand by the High Court, the present application for execution is within time, otherwise it is barred by limitation. The decree-holder suggests that it was reasonable for him to await the decision in the judgment-debtor's suit before proceeding further with the execution of the decree. This, even if true, would not justify the Court in disregarding the law of limitation. S. 15 of the present Limitation Act applies to applications for the execution of a decree and it provides that

"in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded."

In the present case the execution of the decree was not stayed by injunction or order. It is conceded that when the judgment-debtor appealed to the High

Court in November 1908 he did not obtain an order from the High Court staying further execution of the decree. Nor is it suggested that the decree-holder was prevented either by force or by fraud from executing his decree between February 1909 and March 1914, when the present application was made. A little over 5 years elapsed between the dismissal of the previous application and the filing of the present application. It is contended by learned counsel on behalf of the decree-holder that although the case is not covered by S. 15, Lim. Act, and although there is no question of force or fraud on the part of the judgment-debtor, yet he is entitled to a deduction of the time that elapsed between the filing of the judgment-debtor's appeal and the dismissal of his suit by the Subordinate Judge, in accordance with the principle applied in the case of *Rameshwar Singh Bahadur v. Rateshwar Singh* (1). In that case Sir Lawrence Jenkins said :

"From the narrative of these long and tedious proceedings, it is, I think, apparent that the decree-holder has not been remiss; the delay has been occasioned by obstacles for which he cannot be held responsible. And so the decree-holder can claim with some show of reason that the case, viewed as a whole, presents those features which are regarded by the Court as a justification for holding that an application otherwise time-barred may be treated as one for the revival and continuation of earlier proceedings in execution. The decree-holder's application of 24th March 1908 was apt for this purpose, for it contained a prayer directed to obtaining such an order in case the Court thought fraud not established."

The present application for execution did not contain a prayer that it should be treated as one made in continuation of the previous application, but subsequently a petition was presented to the Court praying for permission to amend the application by inserting in it a prayer to that effect. That petition was rejected, but for the purpose of this appeal we may assume that the petition should have been allowed and we may treat the application for execution as if it contained a prayer that it should be treated as one made in continuation of the previous application. Even so, it appears to me that the decree-holder is not entitled to a deduction of the time claimed by him. The case on which he relies can easily be distinguished from the present case. That case arose out of an application made for execution of a

decree passed in December 1893. Shortly before the expiry of 12 years from that date an application regular in all respects was made for execution of the decree.

Thereupon a claim was made on which the Court ordered that the property placed under attachment should be released and soon afterwards it dismissed the application for execution in consequence of the claim case. Immediately after that, further claims were made. Within a year of the dismissal of the application the decree-holder came into Court with an application which, he prayed, might be treated as a continuation of the previous application. From the extract from the judgment given above, it will be seen that the Court was of opinion that the decree-holder had not been remiss in any way. I do not think that that remark applies to the decree-holder in the present case. I can discover no reason whatever why he took no action to execute his decree during the five years after 8th February 1909, and assuming that there is a principle in accordance with which the Court may treat an application *prima facie* barred by limitation as an application made in continuation of a previous application which has been dismissed, it is obvious that the principle can be applied only to those cases where the decree-holder has not been remiss. The present case is not unlike that of *Kartic Chandra Mondal v. Nilmani Mondal* (2). In that case their Lordships, dealing with the contention that the subsequent application should be regarded as a continuation of the previous application, said :

"We need only point out that the previous application was finally disposed of on 5th November 1908, so that that branch of the contention has no substance in it."

So in the present case, the previous application for execution was definitely dismissed in February 1909, not in consequence of any proceedings which had been taken by the judgment-debtor or any other person but because of the default of the decree-holder. In these circumstances it appears to me impossible to treat the present application as one made in continuation of the previous application. I would dismiss this appeal with costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal rejected.

2. (1916) 32 I C 931.

1. (1913) 18 I C 841.

A. I. R. 1916 Patna 369

SHARFUDDIN AND ROE, JJ.

Manners—Defendant—Appellant.

v.

Satroghan Das — Plaintiff — Respondent.

Appeal No. 206 of 1913, Decided on 18th April 1916, from original decree of Dist. Judge, Saran, D/-10th March 1913.

Bengal Tenancy Act (8 of 1885), S. 22—Cultivating raiyat acquiring lease of tenure ceases to be raiyat and must give up possession after expiry of lease.

When a cultivating raiyat, who held the land under a tenure-holder, acquires for a term a lease of the tenure, he ceases to have any right to hold the land as a tenant (raiyyat); therefore after the expiry of the term of the lease he is bound to go and make over possession of the land.

[P 369 C 2]

C. S. Banerjee and *S. C. Mitter*—for Appellant.*Baldeo Narain Sinha* — for Respondent.

Sharfuddin, J.—This appeal is on behalf of the defendant first party in the suit. The plaintiff of the suit, namely, Mahant Satroghan Das, disciple of Mahant Ram Narain Das, brought the present suit for an adjudication that the defendants first and second parties had not acquired any sort of right in the lands in suit, and that they are bound to deliver possession to the plaintiff after the expiry of the lease under which the defendants held the lands. The Subordinate Judge, against whose judgment the present appeal has been preferred, gave a decree to the plaintiff. The defendant first party has therefore appealed to this Court. The facts of the case are that Maharaja Pertab Singh of Darbhanga had assigned 15 bighas odd of land to the mahant of the Asthal called Kamalabari. This area now after survey has been proved to be 13 bighas 19 chataks 7 dhurs. This fakirana land was in possession of one Sarman Mahaton before 1304 Fasli, and that on a thika taken from the mahant, Sarman Singh executed a sub-lease known as Kusthkana in favour of Mr. Manners of the Ilmasnagar Factory. The kobala executed by Sarman shows that he was a tenure-holder and not a cultivating raiyat. Then it appears that Mr. Manners obtained a lease of these lands from the mahant for a period from 1304 to 1318 Faslis on Rs. 34-2-0 as peshgi and with a jama of Rs. 50. On behalf of Mr. Manners it has been argued that he

was a cultivating raiyat under Dhori, and he continued to remain as such even when he took thika directly from the mahant, and that he therefore cannot be evicted.

If Mr. Manners was a cultivating raiyat under Dhori, and if by taking the thika from the mahant he became a tenure-holder under S. 22, the entire interest of the landlord and the raiyat having become united in the same person, namely, Mr. Manners, Mr. Manners cannot have any right to hold the land as a tenant. The question now is, as to whether the lease given to Mr. Manners by the mahant was a lease for cultivating purposes or constituted a tenure. There are many indications from the lease itself that go to show that this is not a cultivating lease but a tenure, because this interest has been described in the lease as thika of the whole entire 15 bighas together with all fakirdari rights, it is clear therefore that by taking this lease Mr. Manners became a fakirana holder. All the rights that vested in the mahant began to vest in Mr. Manners after the execution of that lease; he thereby became a proprietor. The jama stated in the lease, Rs. 60, is in one lump and not by way of rent per bigha. These facts necessarily indicate that the lease constituted a tenure; but there can be no doubt that the lumping up of the annual rental along with other facts in certain circumstances goes to show the intention of the executant and the intention of the party in whose favour the deed was executed. On all these circumstances it appears to me that what was taken by Mr. Manners under that lease was a tenure, and that being so, even supposing that he was a cultivating raiyat under Dhori, whatever right he may have acquired then merged into the right that he acquired under the lease. That being so, under the terms of the contract after the expiry of the period of the lease he is now compelled to go and make over possession to the mahant or the mahant's representatives. He not having done so the present suit was instituted. I think the Subordinate Judge rightly decreed the suit. The appeal is therefore dismissed with costs, hearing-fee Rs. 100.

Roe, J.—I agree.

v.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 370 (1)

MULLICK, J.

Sundar Lal and another—Plaintiffs—Appellants.

v.

Upendra Nath Seal—Defendant—Respondent.

Second Appeal No. 881 of 1914, Decided on 25th April 1916.

(a) Civil P. C. (5 of 1908), O. 43, R. 1 and O. 47, R. 7—Scope—Granting review is appealable though judgment is not—It is subject to O. 47, R. 7.

Under O. 43, R. 1, Cl. (w), Civil P. C., an appeal lies against an order granting a review even where the original judgment is not appealable, but that is subject to the provisions of O. 47, R. 7. No appeal lies therefore against an order granting a review merely 'for sufficient ground.' [P 370 C 1]

(b) Civil P. C. (5 of 1908), S. 115—Patna High Court Judge sitting singly not empowered to act as such—It is doubtful if can entertain revision.

It is doubtful whether a Judge of the Patna High Court sitting singly can entertain an application in revision under S. 115, Civil P. C., when he is not empowered by the Chief Justice to act as such. [P 370 C 2]

Atul Krishna Ray—for Appellants.

Susil M. Mullick and Rishindra Nath Sarkar—for Respondent.

Judgment.—It is clear that there is no second appeal in this case. The decree relates to a sum of Rs. 114-8-9 due on account of house rent, which is a matter cognizable entirely by a Court of Small Causes. Therefore under S. 102, Civil P. C., there can be no second appeal against that decree. Then it is said that although there may be no second appeal against the decree, an appeal from order lies against the order of 1st February 1914 by which the learned Judicial Commissioner reviewed the decree as passed by him on 14th November 1913. Under O. 43, R. 1, Cl. (w), an appeal does lie against the order of granting a review, but that is subject to the provisions of O. 47, R. 7.

In the present case the order granting the review was not for any of the reasons enumerated in O. 47, R. 7, against which objection can be taken. An order granting a review merely for sufficient ground does not appear to be appealable. Therefore this appeal as an appeal against order must also fail. Finally I am asked to treat the memorandum of appeal as an application for revision under S. 115, Civil P. C. I see no reason for entertaining the revision even if I were disposed to do so and had jurisdiction to exercise

my powers under S. 115, but sitting singly and not being empowered by the Chief Justice to take applications for revision under S. 115, I very much doubt whether I have the power to interfere in revision in this matter. Even if I had the power I would not exercise it in this case. The result is that the appeal is dismissed with costs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 370 (2)**

Full Bench

CHAMIER, C. J. AND SHARFUDDIN,
ATKINSON AND KINGSFORD, JJ.

Mt. Wahidunnissa—Defendant—Appellant.

v.

Dip Narain Pershad—Plaintiff—Respondent.

First Appeal No. 380 of 1913, Decided on 26th June 1916, from decision of 2nd Subordinate Judge, Monghyr, D/- 29th May 1913.

(a) Partition—Suit for—Preliminary decree—Appeal against preliminary decree not affected by failure to appeal against final decree subsequently passed.

There is a right of appeal against the preliminary decree in a partition suit and the appellant is not barred of his right to secure an adjudication therein by his failure to appeal against the final decree subsequently passed: *A I R 1914 All 380 (FB), Appr.*; 19 *I C* 630; 20 *I C* 576; 21 *I C* 510 and 30 *I C* 321, *Foll.*; *A I R 1915 Mad 197, Ref.*; 21 *I C* 516; 27 *I C* 135; 33 *I C* 137; and 33 *I C* 146, *Dist.* [P 371 C 1]

(b) Partition—Suit for—Preliminary decree is independent of final decree—Final decree does not extinguish preliminary decree.

Per Sharfuddin, J.—A preliminary decree in a partition suit has existence independent of the final decree and the final decree is really dependent upon and subordinate to the preliminary decree. A preliminary decree retains its force as such even after the passing of the final decree. The final decree does not extinguish the preliminary decree, but instead gives effect to it.

[P 371 C 2]

Syed Mohammad Tahir and Muhammad Hasan Jan—for Appellant.

Kulwant Sahai and Rai Guru Saran Prasad—for Respondent.

Chamier, C. J.—This is an appeal by the defendant in a suit for partition against a preliminary decree passed on 29th May 1913. The appeal was filed on 3rd July 1913. A final decree was made in the case on 27th September 1913, despite the objection of the appellant that the final decree should not be made until her appeal had been disposed of. A preliminary objection has been

taken to the hearing of this appeal, to the effect that this appeal cannot proceed inasmuch as a final decree has now been passed in the case and no appeal has been filed against that decree. In my opinion, the preliminary objection should be overruled. I adhere to the decision of the Full Bench of the Allahabad High Court in *Kanhaiya Lal v. Tribeni Sahai* (1), in which I took part. Further, I consider that it has been shown that there is a strong current of authority in the Calcutta High Court in favour of the view that an appeal of this kind can be heard, although a final decree has been passed in the case and no appeal has been filed against that decree. I would refer to the decisions in *Ram Nath Singh v. Basanta Narain Singh* (*Ugra Narain Singh v. Basan Narain Singh*) (2), *Nistarini Debee v. Rai Mohun Biswas* (3), *Abdul Jalil v. Amar Chand Paul* (4) and *Atul Chandra Singha v. Kunja Behari Singha* (5). In all those cases the appeal against the preliminary decree was filed before the final decree had been made. They are, therefore, on all fours with the present case.

The view taken in those cases is in accordance with the view taken by the Allahabad High Court in the case cited above and with the view taken by the Madras High Court in *Lakshmi v. Marudevi* (6). Our attention has been drawn to the decisions in *Khirodamoyi Dasi v. Adhar Chandra Ghose* (7) and *Sadhu Charan Datta v. Hara Nath Datta* (8). In both those cases the final decree had been passed before the appeal against the preliminary decree was filed. They are, therefore, distinguishable from the present case. For the same reason we may distinguish from the present case the cases of *Balwantsing Ramchandra v. Sakhamam Mancharam* (9) and *Dattaraya Ramchandra Savale v. Ajmuddin Fakruddin* (10) decided by the Bombay High Court. On these grounds, there-

fore, I am of opinion that this preliminary objection should be overruled.

Sharfuddin, J.—Under the Civil Procedure Code a decree may be appealed against. It is, therefore, clear that so long as a decree retains its force as such it can be appealed against. I understand that a preliminary decree in a partition suit has existence independent of the final decree and the final decree really is dependent upon and subordinate to the preliminary decree. In my opinion a preliminary decree retains its force as such even after the passing of the final decree. A preliminary decree is not extinct after the passing of the final decree and the final decree instead of extinguishing a preliminary decree gives effect to it. Agreeing with the observations of His Lordship the Chief Justice I am also of opinion that the objection should be overruled.

Atkinson, J.—I entirely agree with the views expressed by the Chief Justice.

Kingsford, J.—I entirely agree with the views expressed by the Chief Justice.

Preliminary objection overruled.

[Their Lordships then dealt with the case on the merits and delivered the following judgment]

Chamier, C. J.—The respondent claims to be entitled by purchase from two persons named Kamaluddin Ahmad and Rafiqunnissa to a fifteen and a quarter annas shares out of a mahal in Mauza Bobil bearing tauzi No. 3841. The defendant appellant is the owner of the remaining nine pies share in the mahal. She resisted this suit for partition of the mahal on the ground that on 1st June 1888, when the different members of the family divided up the family property, they agreed to allow Mauza Bobil to remain unpartitioned until certain suits, which had been brought by third persons in respect of a village allotted to the present appellant, had been disposed of. It appears, however, that notwithstanding the agreement contained in the ekrarnama of 1st June 1888, the present appellant claimed partition of Mauza Bobil. Kamaluddin, one of the persons through whom the present respondent claims, objected that the village should not be partitioned and he relied upon the ekrarnama of 1st June 1888. His objection was overruled and partition was effected and two mahals were formed

1. A I R 1914 All 380=36 All 532=24 I C 827 (FB).
2. (1913) 19 I C 630.
3. (1913) 20 I C 576.
4. (1913) 21 I C 510.
5. (1915) 30 I C 321.
6. A I R 1915 Mad 197=37 Mad 29=12 I C 664.
7. (1913) 21 I C 516.
8. (1915) 27 I C 135.
9. (1916) 33 I C 37.
10. (1916) 33 I C 146.

in the village. The appellant in her written statement in the present case alleged that the suits referred to in the ekrarnama were still pending. Whether this is so or not we think that she cannot resist the suit on that ground. She herself in conjunction with her relative Azizunnissa claimed partition of this very village in 1894 and she cannot now resist the claim of the purchaser from Kamaluddin. In my opinion the partition to be effected in this case will not affect in any way any right which the appellant may have under the ekrarnama of 1st June 1888. I would dismiss this appeal with costs.

Sharfuddin, J.—I agree.

Atkinson, J.—I agree.

Kingsford, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 372

CHAMIER, C. J., AND JWALA PRASAD, J.
Ambica Tewari and another — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 3 of 1916,
Decided on 27th April 1916.

(a) Criminal P. C. (1898), S. 195 (6) (7)
— Cl. (7) (c) is not independent sub-section
— Scope of Cl. 7 — Construction of Cl. (c) stated.

Clause (c), sub S. 7, S. 195, Criminal P. C., cannot be construed as if it were an independent sub-section. [P 372 C 2]

The whole sub-S. (7) is confined to Courts against whose decisions or some of whose decisions appeals do lie. The words "where no appeal lies" in Cl. (c) of the sub-section do not refer to Courts against none of whose decisions an appeal lies, but refer to particular cases in which no appeal lies 34 All. 197, Foll [P 372 C 2]

(b) Criminal P. C. (5 of 1898), S. 195 (6)—
District Judge is not superior Court to Small Cause Court within Cl. (6).

A District Judge cannot entertain an appeal under S. 195 (6) against an order granting or refusing sanction by a Small Cause Court situate within the local limits of his jurisdiction.

[P 372 C 2]

S. Sinha—for Applicants.

Assistant Government Advocate — for the Crown.

Chamier, C. J.—This is an application for revision of an order of the District Judge of Saran directing the prosecution of the applicants for offences under Ss. 209, 210, 193 and 471, I. P. C. The first applicant Ambica Tewari brought a suit in a Court exercising the powers of a Court of Small Causes against Badri Kandu on the basis of a hand-note said

to have been signed by Badri. A decree was passed against Badri in that case ex parte. Badri then brought a suit to have the ex parte decree set aside, on the ground that it had been obtained by fraud and obtained a decree. He then applied to the Court which tried the first-mentioned case for sanction to prosecute Ambica Tewari and a witness in the case named Asarfi Tewari. The Court rejected the application. Badri appealed to the District Judge under S. 195, sub-S. 6, Criminal P. C., to revoke the order. The District Judge was of opinion that it was not a case in which sanction should be given as Badri might hold the sanction in terrorem over the heads of Ambica and Asarfi and use it for the purpose of extorting money but he passed an order under S. 476 for the prosecution of both men on the charges mentioned above.

The present application for revision is made on two grounds, namely, that the District Judge had no authority to entertain an appeal or application against the order sanctioning the prosecution, and, therefore, the matter did not come to his notice in the course of a judicial proceeding within the meaning of S. 476 Criminal P. C., and secondly, that it is not a case in which an order should be made for the prosecution of the applicants. I am not of opinion that the District Judge had no jurisdiction to entertain either an appeal or an application under S. 195, sub-S. (6), Criminal P. C. I had occasion to consider the construction of sub-Ss (6) and (7) in the case of *Ajodhia Parshad v. Ram Lal* (1) and I adhere to the opinion which I expressed in that case. It seems to me that Cl. (c), sub-S. (7), S. 195 cannot be construed as if it were an independent sub-section. Apart from this, however, it appears to me that this is certainly not a case in which an order should be made for the prosecution of the applicants. The prosecution cannot succeed except on proof that the hand-note is a forgery. The hand-note is not signed at all but bears a thumb impression said to have been made by Badri. The District Judge has referred to the evidence of experts on the subject. They disagreed with each other and one of them said that the thumb impression was so blurred that he could

not express an opinion at all. There seems to be no doubt that the prosecution, if allowed, will end in an acquittal. I would allow the application and set aside the order of the District Judge directing the prosecution of the applicants.

Jwala Prasad, J.—I agree. In my opinion the prosecution should not be sanctioned in this case.

V.S./R.K.

Petition allowed.

A I. R. 1916 Patna 373

SHARFUDDIN AND ROE, JJ.

Raghunath Tewari and another—Judgment-debtor—Appellants.

v.

Mt. Radhessor Kuar — Decree-holder—Respondent.

Second Appeal No. 26 of 1916, Decided on 6th June 1916, from decisions of Dist. Judge, Gaya, D/- 7th October 1915.

Civil P. C. (5 of 1908), O. 21, Rr. 9 and 13 — Execution — Description of property in decree amplified in application for execution—Duty of Court — Proper course suggested.

The decree-holder, being apprehensive that the description of property given in the decree was not sufficient to identify it, gave an amplified description of it in the application for execution of decree :

Held : that in such a case the proper course for the Court was to advertise for sale the right, title and interest of the judgment-debtors in the property as described in the decree, and then enter for purposes of identification the description given by the decree holder in the application for execution in order that intending purchasers might have an idea of the value of the property. But this entry should be made as a foot-note and it should be made clear that the additional information was furnished by the decree-holder. [P 373 C 2; P 374 C 1]

Jogesh Chandra De and Susil Chandra Mallick—for Appellants.

Sivanandan Rai—for Respondent.

Judgment.—In this case the appellant before us is a judgment-debtor, who has been held liable to pay maintenance to the respondent decree-holder in accordance with the terms of a will. In a suit upon this will a decree was obtained by this lady, the respondent, declaring a charge upon certain properties described in her plaint. By this decree she obtained an order for sale of properties as described by her in her plaint as liable to the charge created by the sale. She now comes in execution of this decree and asks that these properties be put up for sale for the realization of the debt

due under her charge. She was apparently apprehensive that the description given in her original plaint was not sufficient to make it clear exactly what properties were being sold. She therefore in her application for execution amplified largely the details of the description of these properties, with the result that it was found by the learned Subordinate Judge that in several instances the properties as described in the decree made in her favour were not identifiable at all. The learned Subordinate Judge was however satisfied that the remaining properties were clearly identifiable on the description given in the decree and that there would be no prejudice to the judgment-debtor by reason of the amplified description given by the decree-holder in her application for execution. He therefore ordered the properties to be advertized for sale under the description given by the decree-holder in her application for execution. This, I think, was not justified by any provision contained in O. 21.

The learned Subordinate Judge called to his assistance R. 13. But R. 13 is applicable only to execution in decrees for money, not to decrees made upon a charge or mortgage. The learned District Judge has explained that this section was quoted by the lower Court only as creating an analogy. He dismissed the appeal on the ground that O. 20, R. 9, allowed general descriptions to be given in the decree, and that there was no reason why such a description should not be amplified in the application for execution. The judgment-debtors have again appealed. The proper course for the learned Subordinate Judge was, in my view, to make an enquiry and, if satisfied that the description given in the decree was sufficient to secure in due course identification of the property when the time came for delivery of possession, to proceed to sale. It was also open to him to refuse to proceed to sale when the sale was bound to be futile by reason of the impossibility of identifying the property by the description given in the decree. But he had not arrived at the stage when an adjudication was required of what property would actually pass by the sale. His proper course was to advertise for sale the right, title and interest of the judgment-debtors in the property as described in

the decree and then enter for purposes of identification the description given by the decree-holder in the the application for execution, in order that intending purchasers might have an idea of the value of the property. But this entry should have been made as a footnote and it should have been made clear that these additional boundaries were not boundaries adjudicated by the Court but only boundaries alleged by the holder of the decree. I would direct therefore that fresh sale proclamations be drawn up in these terms. The appeal is to this extent allowed. I would make no order as to costs.

V.S./R.K.

*Appeal allowed.***A. I. R. 1916 Patna 374**

MULLICK, J.

Tuni Oraon—Defendant—Appellants
v.*Leda Oraon and another—Plaintiffs—Respondents.*

Second Appeal No. 4201 of 1913, Decided on 14th April 1916, from decision of Judicial Commissioner, Chhota Nagpur, D/- 6th September 1913.

(a) Succession Act (10 of 1865), S. 332—Scope—Decision in this section does not mean final but any one under appeal.

A notification under S. 332, Succession Act, declared Oraons, etc., exempted from the provisions of the Act, "provided that this notification shall not affect any person in regard to whose rights a decision contrary to its effect has already been given by a competent civil Court":

Held: that the decision here meant is not some final decision such as would operate as res judicata but includes a decision under appeal.

[P 374 C 2]

(b) Interpretation of Statute—Customary law once codified no custom can be relied upon much less an inconsistent one.

After Customary law has been stereotyped in the form of a statute which contains no provision saving custom, it is not open to a Court to give effect to custom, much less to a custom inconsistent with the statute: 23 All 20 and 9 M I A (P C) 195, Dist.

[P 375 C 1]

Obiter: Reference to works of history at the appellate stage is irregular and should be avoided: 12 Mad 495, Ref.

[P 375 C 1]

*Atul Krishna Ray—*for Appellant.*Guru Saran Prasad—*for Respondents.

Judgment.—The plaintiffs and the defendant are Oraons, an aboriginal tribe in Chota Nagpur. The suit is for recovery of possession of certain lands, on the allegation that by custom the plaintiffs, who are the male agnates of one Somra, deceased, are entitled to

succeed to the exclusion of the defendant, who is the daughter. The Munsif dismissed the suit, holding that as the Succession Act applied, the parties being neither Hindus, Mahomedans nor Buddhists, the daughter had a preferential right to the brother and brother's son. But the learned Judicial Commissioner has set aside that decree on the ground that the Succession Act, did not apply by reason of a special notification issued under S. 332 of the Act by the Government of India during the pendency of the appeal before the Judicial Commissioner, and that the plaintiffs had proved a special custom that females are excluded from inheritance to immovable property. The present appeal before me has been preferred by the defendant.

It is clear that the learned Judicial Commissioner is wrong in holding that the notification of the Government of India applies to the present case. The notification expressly states that it is not to apply when there has been a decision of a competent Court regarding the rights of the parties. I cannot agree with the learned Judicial Commissioner that the decision here means some final decision such as would operate as res judicata. The Munsif's decision was the decision of a competent Court, and, in my opinion, the rights of the parties are untouched by the notification and are governed by the Succession Act. It is contended however by the learned Vakil for the respondent that the learned Judicial Commissioner has found that a custom exists to exclude females and that this custom must override the Statute. Now the applicability of custom to the case before us arises by virtue of S. 37, Act 12 of 1887, and it cannot be disputed that in the case of Hindus, custom outweighs the written text of Hindu law. As regards Mahomedans, although there are cases to the contrary, it has been held that custom cannot override the text of the Mahomedan law: *Jammya v. Diwan* (1). So again in the case of trade customs it has been held that usages may be proved to override the law merchant, that is to say, the Common law. In the case of codified law the ordinary practice of the Legislature is to make special provision when it thinks fit to do so for the sav-

ing of custom, usage and customary rights. But I have been unable to find any authority that, after Customary law has been stereotyped in the form of a Statute which contains no provision saving custom, it is open to a Court to give effect to custom, much less to a custom inconsistent with the Statute.

In *Abraham v. Abraham* (2) it was held that a particular family custom is capable of attaching to Hindus converted to Christianity but that case was before the passing of the Succession Act and I have been unable to find any instance of custom varying the rules of the Act among parties who are governed by it. As the Act contains no clause saving custom, the Courts are not competent to accept custom as a reason for deviating from the provisions of the Act. The learned Judicial Commissioner therefore is, in my opinion, wrong, and the decree of the Munsif is right. As regards the question whether the custom has been proved, the learned Judicial Commissioner has dealt with it very summarily and it is not clear whether he has considered all the points necessary for the proof of a custom at law. He has based his finding chiefly on the writings of three authors, which do not appear to have been ever adduced in evidence or referred to in the Court of first instance. I would invite the attention of the learned Judicial Commissioner to the observations of the Madras High Court in *Vallabha v. Mudusudan* (3), to the effect that reference to works of history at the appellate stage is irregular and to be avoided. The result is that the appeal is decreed with costs and the decree of the Munsif is restored.

V.S./R.K.

Appeal decreed.

2. (1861-63) 9 M I A 195=1 W R 11 (PC).

3. (1889) 12 Mad 495.

A. I. R. 1916 Patna 375

MULLICK AND KINGSFORD, JJ.

Jahnavi Prasad Singh — Plaintiff — Appellant.

v.

Gharbaran Dubey — Defendant — Respondent.

First Appeal No. 76 of 1913, Decided on 25th May 1916, from decision of Sub-Judge. Chapra, D/- 27th November 1912.

(a) **Mortgage — Decree absolute for sale against deceased mortgagor without substituting heirs—Sale cannot be challenged.**

Where in a suit on a mortgage a decree absolute for sale has been obtained against a deceased mortgagor without substituting or mentioning his sons as his heirs and a sale has taken place, the sons cannot challenge the sale : 28 Cal 73, Ref. [P 379 C 1]

(b) **Mortgage — Decree against father — Self-acquired property — Sons under Mitakshara law not entitled to redeem.**

Sons under the Mitakshara law have no right to redeem the self-acquired property of their father sold in execution of a mortgage decree obtained against the latter : 20 All 267 (P C), Ref. [P 380 C 2]

(c) **Execution—Setting aside — Legality of sale—Suit for possession — Sale need not be set aside.**

In a suit for possession of property sold in execution of a decree on the basis that the sale was a nullity, it is not necessary to set aside the sale : 11 C W N 1078, Diss from 12 I C 155, Foll. [P 380 C 2]

(d) **Mortgage — Redemption — Equity of redemption sold in second mortgage—Mortgagor not entitled to redeem first mortgage.**

After an equity of redemption has been sold away in execution of a decree on a second mortgage, it is not open to the mortgagor to sue for redemption of the first mortgage : *Kinnaird v. Trollope*, (1888) 39 Ch D 636, Dist. [P 380 C 1]

(e) **Limitation Act (9 of 1908), Sch. 2, Arts. 12 and 95 — Suit for redemption — Arts. 12 and 95 do not apply.**

Articles 12 and 95, Sch. 2, Lim. Act, 1877, do not apply to a suit for redemption, as in such a suit it is not necessary to set aside the decree or the sale. [P 381 C 2]

(f) **Civil P. C. (14 of 1882), S. 578 — Guardian-ad-litem—Appointment without notice —Irregularity is curable being immaterial.**

If in fact the Court has allowed a party to appear as the guardian of a minor and to conduct proceedings in his behalf the mere circumstance that notice was not issued to the guardian is immaterial and is curable as an irregularity under S. 578 of the Code of 1882 : 30 Cal 1021, (PC), Ref. [P 378 C 2]

G. D. Sinha—for Appellant.

Mustafa Khan and Harnarian Prasad—for Respondent.

Mullick, J.—This litigation arises out of a mortgage decree obtained by one Ramadhin Dube against Debi Prasad Singh, Mt. Debi Koer, widow of deceased defendant 2 in that suit, Jadunandan Singh, Mt. Lachminia Koer, widow of a deceased defendant Lachmi Singh, Sowdagar Singh, Pertab Singh, Ram Nihora Singh, Mt. Manrup Koer, and Mt. Pardipa Koer. The suit, was brought upon a mortgage executed on 25th May 1887 by Debi Prasad Singh, Lachmi Singh and Jadunandan in respect of a 5-annas pucca share corresponding to a 10-annas katcha share in Mauza Koini. The suit

was instituted on 19th April 1897. On 28th June 1897 Mt. Pardipa and Mt. Lachminia were substituted in place of their husbands Jadunandan and Lachmi. On 27th July 1897 an *ex parte* decree was passed in favour of the plaintiff and the decree was signed on 13th August 1897. Apparently nothing further was done till 3rd September 1898, or at any rate if anything was done there is no trace on the order-sheet of it. The records of the case excepting the order-sheet have all been destroyed and it is no longer possible to say with certainty whether the parties took any steps other than the steps which appear on the order-sheet. On 3rd September 1898 an application for an order absolute was made by the plaintiff. Notices were issued to the defendants and on 13th December 1898 the order absolute under S. 89, Act 4 of 1882, was duly made. Execution was applied for on 16th January 1899. On 8th May 1899 the mortgaged property was sold at auction and purchased by the decree-holder for Rs. 7,430-10-9. The sale was confirmed on 6th July 1899 and the sale certificate was issued on 25th October 1899. It is important to notice that in this certificate the names of Jahnavi Prasad and Maheshri Prasad, plaintiffs 1 and 2 in the present suit, and of Lalita Prasad appear as the sons and representatives of Debi Prasad.

The present suit was brought by Jahnavi and Maheshri on 25th October 1911 and the first six defendants impleaded are the heirs of Ramadhin, the auction-purchaser in the suit of 1897. The other two defendants are Pardipa Koer and Lachminia, widows of Jadunandan and Lachmi. The plaintiffs claim declaration of title to and recovery of possession of the property sold at auction on 5th May 1899, on the ground that the sale was fraudulent, collusive, invalid and illegal. In the alternative, by an amendment of the plaint made on 20th September 1912, the plaintiffs ask that if the mortgage bond dated 25th May 1887 is found to be genuine and binding upon the plaintiffs, then it may be adjudged by the Court that the plaintiffs have a right to redeem the property. Written statements were filed by defendants 1 to 6. The learned Subordinate Judge has found that the decree of 27th July 1897

was a valid and operative decree, that it is binding upon the present plaintiffs and that the plaintiffs have no cause of action. Apart from this the learned Court also finds that the plaintiffs cannot either recover the property or redeem it. He has accordingly dismissed the whole suit. Hence the present appeal before us by the plaintiffs. The first and main question that arises in the case is whether Debi Prasad was alive at the time of the preliminary decree of 1897.

According to the plaintiffs he died on 5th Magh 1304, corresponding to 12th January 1897. According to the defendants he died on 3rd or 4th August 1897 corresponding to 20th Sraban 1304. The onus of proving that Debi Prasad died on 5th Magh 1304, or at any rate that he died before the preliminary decree of 27th July 1897, lies heavily upon the plaintiffs, and, in my opinion, they have completely failed to discharge that onus. The learned *vakil* who appears in their behalf before us has not thought fit to rely very greatly upon the oral evidence adduced as to the date of Debi Prasad's death. After the lapse of 12 years one would naturally not expect the witnesses, who come to depose upon this point, to have any very clear memory as to the exact date. The first of these witnesses is Panchanand Ojha, an alleged family priest. He deposes that Debi Prasad died in Magh 1304; that the *sradh* took place in Gaya and that he was present at that *sradh*. He can give no reason for remembering the date of this particular death and he confesses that he notes the dates of births and deaths in a paper, but he has not produced that paper before the Court. It is clear from his cross-examination that he was not in a position to remember the date of Debi Prasad's death at all. He does not remember the dates of any of Debi Prasad's three marriages.

The next witness is Deonarain Lal, who is the *patwari* of a village belonging to Debi Singh's second son Lalita. He deposes that Debi Prasad died at Sowhani in Magh 1304 and that the body was taken away for cremation in his presence, but that the *sradh* was performed not at Sowhani, but at Gaya. He says that there are accounts showing the expenses of the *sradh* but these accounts are not produced. He does not

remember the dates of the births of his own sons and cannot give any satisfactory reason for remembering the date of Debi Prasad's death. I cannot place any reliance upon the evidence of the witness.

Witness 3 is Bujhavan Tewari, who deposes that Debi Prasad died in 1304 in which year the Survey and Record of Rights took place. That would be a good reason for remembering the year, but the witness does not explain how he remembers the month, which in the case before us is the important point. Witness 4 is Sew Charan, a barber, who says he was taken from Basantpur, which is the ancestral home of Debi Prasad, to Gaya by the plaintiffs to officiate at the funeral ceremony. He deposes that Debi Prasad died in Magh 16 years previously. That would make Debi Prasad's death either in 1896 or in 1897. He says that with the exception of Debi Prasad's death he cannot state the date of the death of any other persons of his family, and that he does not remember in which years his own children were born. His evidence is of the same kind as that of the preceding witnesses and does not impress me at all.

The next witness is Kunj Behari Singh of Khami who does not live either at Basantpur, the ancestral home of Debi Prasad, or at Sowhani, where he died but he nevertheless deposes that Debi Prasad died 14 to 15 years previously. His evidence is inconclusive. The next witness is Shadavan Thakur, who is a cultivator at Sowhani and deposes that Debi Prasad died in Magh 1304. He was a servant of Debi Prasad and is now a servant of Lalit on a salary of Rs. 26 per annum. He did not take any note of the date of Debi's death and cannot give the dates of the deaths of any other member of the family. I am not impressed by his evidence. The next witness is Hara Prasad Singh, who is a member of the family and was the guardian of Lalit Prasad. He deposes that Debi died seven or eight months before his appointment as guardian, which was in Bhadra or Aswin 1304 to 1305. In cross-examination he admits that he lives 40 miles away from Sowhani and he only heard of Debi's death when he went to Sowhani. This witness's know-

ledge is based on hearsay and cannot be relied upon.

But the learned vakil for the appellants, while admitting that the above evidence is not conclusive, relies upon a sale-deed executed by plaintiff 1 Jahnavi Prasad on 14th January 1898 in favour of his brother-in-law Rajendra Prasad. In that sale-deed it is recited that Jahnavi is selling to Rajendra a piece of ancestral property for Rs. 999, and the reason assigned for borrowing the money is that he had to pay off two previous loans taken on a chitti for Rs. 528 from one Lakshman Lal Roy and for Rs. 324-4-9 from Oojagir Singh respectively. It is recited in the kobala that this letter (chitti) was dated 10th of Sraban 1304 and was on account of a loan taken for the sradh of Jahnavi's father. The plaintiffs argue from this that this document, executed 14 years before the present suit when there was no necessity to make a false statement with regard to the death of Debi, is strong evidence of the fact that Debi must have died earlier than 10th Sravan 1304, i. e., before 24th July 1897. That would at all events show that he was dead on the day when the preliminary decree in the mortgage suit of Ramadhin was made.

Now with regard to this document it is to be observed that the statement as to the date of Oojagir's chitti is at best only an admission made by the plaintiff 1 himself and is evidence only if it can be held that it was made in the kobala in the ordinary course of business. I very much doubt whether it was necessary for the purpose of the kobala to recite in it the date of the previous chitti, and I am fortified in this view by the fact that in respect of the chitti given to Lakshman Lal no date is recited. I would be inclined to hold that the recital of the date was not made in the ordinary course of business and therefore the recital would not be admissible in evidence under S. 32, Cl. 2, Evidence Act; but the defendants in the Court of the Subordinate Judge raised no objection to the admissibility of the document and it is possible that they took the view that the recital was made in the ordinary course of business. I will in these circumstances not rule that the document was inadmissible, but accepting the document as evidence,

in the case I think very little weight is to be attached to it. The chitti itself is not produced. It would be the best evidence of the date on which it was executed. In these circumstances the recital in the kobala of the date of the chitti is only second hand evidence and, having regard to the other evidence in the case, I agree with the learned Subordinate Judge that we cannot accept it to be correct. On the other hand, the defendants have produced two account books which show that presents were sent to the family house of Debi at Basantpur on the occasion of his *sradh*. The first of these entries dated 11th August 1897, corresponding to 25th *Sraban* 1304, shows that Debi could not have died earlier than 27th July 1897. The second of these shows that he could not have died earlier than 3rd August 1897. It is true that these account books were produced from the custody of a relative of Debi Prasad's, but that is not a sufficient reason for assuming that they come from a family that is hostile to Debi; at any rate no enmity has been established by the evidence. The entries in the account books have been proved by Sewsaran Lal, a servant of the family which sent the *sradh* presents, and I agree with the learned Subordinate Judge that there is no reason for distrusting them.

The plaintiffs in the lower Court also produced a chowkidar's note book showing the death of Debi on 12th January 1897. From the appearance of the document I am satisfied that the entry is an interpolation. The book appears to have come from the custody of the chowkidar himself and was written by one Ram Khelawan. The chowkidar is no longer in the service of Government and it is not shown why he has preserved all the books in which the deaths in his village were recorded. He was not officially required to keep any such books and the proper registers which the plaintiffs should have produced were the registers kept at the Police Station. I am unable therefore to rely upon the documentary evidence produced by the plaintiffs. I have already said that the oral evidence does not impress me favourably. It is a suspicious circumstance that only two witnesses are called who were present at the *sradh* ceremony. It is suggested by the learn-

ed *vakil* for the respondent that Debi's *sradh* was in fact performed at Basantpur and that it is now placed at Gaya, which is over 80 miles away, so as to explain the absence of neighbours and members of the family.

On a review of the whole evidence I am satisfied that Debi died as alleged by the defendants on 3rd or 4th August 1897. He was therefore alive at the time of the preliminary decree. As regards the order absolute, which was made on 13th December 1898, the defendants allege that plaintiff 1 was substituted in his own behalf as an adult and as guardian of his minor brother, plaintiff 2. It is contended by the appellants that no substitution was made at all, but there is nothing whatever to support this. The record having been destroyed with the exception of the order-sheet it is not possible for the defendants to ascertain the truth by reference to the record. But on the other hand, the onus is upon the plaintiffs heavily to show that their statement is correct. We do know that the two plaintiffs were substituted in the execution proceedings and in the sale certificate dated 25th October 1899. There is no reason for holding that the necessary substitution was not also made in the order absolute. The omission of any order for substitution in the order-sheet does not prove that no substitution was in fact made. Then it is alleged that no notice was served upon plaintiff 1 informing him that he was appointed guardian of his minor brother. The reply to this also is that in the absence of the record it is not possible to say that the notice was not served. The omission of any entry in the order-sheet showing issue of notice is immaterial.

On the subject of the notice it is also necessary to observe that the proceedings were held under the old Civil Procedure Code and the case of *Walian v. Banke Behari Pershad Singh* (1) is authority for the proposition that if in fact the Court has allowed a party to appear as the guardian of a minor and to conduct the proceedings in his behalf, the mere circumstance that a notice was not issued to the guardian is immaterial and is curable as an irregularity under S. 578 of the old Civil P. C.

1. (1903) 30 Cal 1021=30 I A 182 (P O).

In other words, if there was in the order absolute at the execution proceedings any irregularity by reason of non-service of notice upon plaintiff 1 as guardian of his minor brother plaintiff 2, it is no longer open to the plaintiff after the sale has been held to challenge the sale and to declare it void on the ground of that irregularity.

With regard to the order absolute it has been submitted by the learned vakil for the respondent that while the present law makes it necessary for the Court to draw up a decree, the former Transfer of Property Act (Act 4 of 1882), requires that only an order should be drawn up and that even where the Court had without drawing up an order caused a sale to take place, the omission to draw up the order was held to be at most an irregularity. It is contended therefore on the authority of *Phul Chand Ram v. Nursingh Pershad Misser* (2), that even if the plaintiffs were not substituted or mentioned in the order absolute as the heirs of their father Debi Singh, still as the sale has already taken place they are no longer competent to challenge that sale. I think this contention is well-founded. The learned vakil for the appellant next contends that even if the plaintiffs were brought upon the record for the order absolute and execution proceedings, plaintiff 1 was a minor at that time and therefore could represent neither himself nor his brother whose guardian he is alleged to have been in those proceedings. Now for this purpose evidence was given in the Court below of the age of plaintiff 1. According to the horoscope filed by the plaintiff himself he was born on 12th Magh 1803 Sakha, which corresponds to the 16th January 1882. According to the plaintiff's history of services recorded by Government in whose employ the plaintiff is now serving, his birth took place in June 1881 and according to the admission book in the Patna College where he was educated his birth took place on 21st March 1877. In this state of affairs the learned Subordinate Judge has accepted the testimony of the Head Master of the school, who produces the admission book and swears that it is kept in due course of business. I agree with the learned Subordinate Judge and find upon a con-

sideration of all the evidence in the case that the plaintiff was born on 21st March 1877. Therefore he was properly described as an adult in the execution proceedings. To sum up, I find that Debi Singh died on 3rd or 4th August 1897; that plaintiffs 1 and 2 were properly brought upon the record before the order absolute was made; that notice appointing plaintiff 1 to be guardian ad litem for plaintiff 2 was duly served upon plaintiff 1 and that he was of due age to act as such guardian, that even if there was any defect by reason of omission to serve him with notice of guardianship either in the proceedings connected with orders absolute or the sale, the plaintiffs are no longer competent to plead that the order absolute and the sale are void.

In view of these findings it would seem unnecessary to consider any of the other points raised in the Court below except that of limitation; because the decree would then be operative and binding on them and their right of redemption would be extinguished by the order absolute. But as these points have been pressed on us at some length, I think it is desirable that I should shortly discuss them. The plaintiffs contend that the decree of 1897 was a complete nullity, not only on the ground that Debi died before it, but also on the ground that the widows of Jadunandan and Lachmi against whom the decree was obtained had no interest in the property of their deceased husbands, and that by survivorship the plaintiffs had the right to be substituted instead of these ladies. With regard to the date of Debi's death I have already dealt with it, but the other point is one which must be considered. It is quite clear from the contention of the plaintiffs that the five-annas share in Mauza Koini which was sold in execution of Ramadhin's decree was not joint ancestral property.

Eight annas of the mauza were inherited by Lachmi from his maternal grandfather. There was then litigation with the other members of his grandfather's family in which Lachmi was assisted by Debi Prasad, Ishri and Jadunandan and being successful in the end in that litigation Lachmi made a gift, by an ikrarnama dated 26th August 1881, of one anna to Debi Prasad, one anna to

Jadunandan, 3 annas to Ishri Prasad and kept the balance of 3 annas for himself. There is nothing whatever to show that at the time when this ikarnama was executed there was any joint family in existence. I agree with the learned Subordinate Judge that these shares must be treated as the separate self-acquired properties of the grantees of the deed of 26th August 1891. That being so, the widows of Jadunandan and Lachmi were properly made parties to the suit and the present plaintiffs had no right to be joined at all as survivors.

I will next deal with the question of redemption. Upon the view of the facts which I have taken, it would seem that the plaintiffs have no right of redemption subsisting but the learned vakil for the respondent has supported the decision of the lower Court on two further grounds. The first of these is that on the date of the suit there was no subsisting right of redemption in the plaintiffs by reason of certain mortgage-decrees obtained against them by subsequent mortgagees. It is admitted that the second mortgagees sued upon their mortgages and in execution purchased the right of redemption; so that when the first mortgagee Ramadhin brought his suit it would appear that the mortgagors had no equity of redemption left. But the learned vakil for the appellants replies that the equity of redemption was not completely extinguished so far as the first mortgagee was concerned, and he relies upon the case of *Kinnaird v. Trollope* (3) to show that when a mortgagee sues a mortgagor who has assigned away his equity of redemption, the mortgagor is entitled even after the assignment to redeem. In other words, the right of redemption, which is reciprocal right, revives as soon as the mortgagee brings the mortgagor upon the record. That case however is not this case. In this case there is no mortgagee suing a mortgagor whose equity of redemption has been extinguished by a second mortgagee. The learned vakil admits that he has been unable to find any authority in the Indian Courts to support the proposition that after a mortgagor's equity of redemption has been sold away in execution of a decree obtained by a second mortgagee, it is still open for the mortgagor to bring a suit for redemption

against the first mortgagee. In my opinion there is no foundation for a proposition of this kind and I agree with the learned vakil for the respondent that on the day of the present suit the plaintiffs had no equity of redemption left in them.

The next ground on which the learned vakil for the appellants relies is that being the sons of Debi, the plaintiffs had a right of redemption jointly with Debi on the date of the preliminary decree of 27th July 1897 and that not having been made parties to that decree they are now entitled to redeem, if not the whole, at least Debi's own 1-anna share. The prayer to redeem the whole is sought to be founded on the principle that one co-sharer mortgagor can always redeem the shares of his other co-sharers. But the reply to this is that the plaintiff's claim is based on their status as Mitakshara sons, who ought to have been joined as co-defendants with Debi because by their birth they became entitled to a share in the mortgaged property. That status however would confer no right to redeem the shares of Debi's co-sharers which formed no part of Debi's ancestral property. The learned vakil appearing in their behalf does not press this point, but he urges that the plaintiffs are certainly entitled to redeem Debi's 1-anna share. But, in my opinion, they cannot even do this, for the simple reason that the plaintiffs were not members of a joint undivided Hindu family with their father in respect of the property which they ask to redeem. The property was the self-acquired property of their father and by their birth they acquired no rights in it. The only rights which they could have claimed would be that of inheritance after Debi's death; but in the suit against Debi they had no right of redemption by reason of their being Mitakshara sons. The case of *Balwant Singh v. Rani Kishori* (4) is sufficient authority for this proposition. The learned Subordinate Judge has relied upon the case of *Ram Taran Goswami v. Rameswar Malia* (5) for the purpose of showing that it is necessary for the plaintiffs first of all to set aside the sale, but the case of *Bangsa Das v. Genalal Jha* (6) is clear authority to the con-

4. (1898) 20 All 267=25 IA 54 (P C).

5. (1907) 11 C W N 1078.

6. (1911) 12 I C 155.

3. (1888) 39 Ch D 696=57 L J Ch 905.

trary. It is not necessary for the plaintiffs to set aside the sale. I hold however that they are not entitled to redeem the share of their father because they had no interest in the property at the time of the decree against him.

Finally there remains the question of limitation. This question is independent of the validity of the decree and the sale. The learned Subordinate Judge has found that the dispossession of the plaintiffs commenced on 25th October 1889, that is, the date of Ramadhin's sale certificate; that period of limitation expired on 24th October 1911 and as the Courts were closed on that day the suit was properly brought on 25th October 1911. The learned vakil for the respondent has addressed to us an elaborate argument for the purpose of showing that long before 25th October 1899 Debi had been dispossessed by Partap and Sowdagar, purchasers in execution of second mortgages upon the property. These sales were held in execution of the mortgage-decree of one Lal Bahadur. It appears that the names of Partap and Sowdagar were registered in the Collector's register on 6th June 1895 in respect of Lachmi's 8 annas share in the mauza. It also appears that Mahadeo, Mahendro and Baijnath purchased the 3 annas share of Ishri, included within the said 8 annas, in execution of decrees obtained on 20th June 1895 and on 14th January 1896 and obtained an order from the Deputy Collector to register their names in respect of 3 annas and the names of Sowdagar and Partap in respect of 3 annas.

On 10th April 1897 a separate account was opened by Mahadeo, Mahendro and Baijnath for their 3 annas pucca share. Subsequently Partap and Sowdagar defaulted in the payment of Government revenue and one Oojagir purchased their share at auction-sale, but subsequently transferred that share to the wives of Partap and Sowdagar who got their names registered on 23rd September 1898 in respect of a 5 annas pucca share. But, in my opinion, these transactions, although some evidence of possession, are not conclusive. The oral evidence called by the defendants to prove actual physical possession is altogether unsatisfactory. A number of tenants have been called to depose as to payment of rent to Partap and Sowdagar, but not a single

rent receipt or other document is produced to corroborate their story. I agree with the learned Subordinate Judge that Debi at least was in joint possession till the date of the sale certificate. That being so, the suit was within time.

Then the learned vakil for the respondent urges that Arts. 12 and 95, Sch. 2, Lim. Act, apply to this case and that it is necessary for the plaintiffs first of all to set aside the decree and then the sale. In my opinion, it was not necessary for the plaintiffs in a suit for redemption to set aside the decree and the sale at all. Much less was it necessary to set aside the sale if the mortgage-decree was a nullity. I therefore think that this suit is not barred by limitation. Nevertheless the extraordinary delay made by the plaintiffs in bringing this suit gives substance to the accusation that they knew that their equity of redemption was extinguished long ago and that they had no chance of success. The result is that the appeal fails and is dismissed with costs.

Kingsford, J.—I agree.

V.S./R.K.

Appeal rejected.

A. I. R. 1916 Patna 381

MULLICK, J.

Central Karkend Coal Co., Ltd.—
Defendant—Appellant.

v.

Kartic Rewani—Plaintiff — Respondent.

Second Appeal No. 3397 of 1914, Decided on 31st March 1916, from decision of Addl. Sub-Judge, Manbhum, D/- 2nd September 1914.

(a) Ejectment—Title with third person—Plaintiff claiming on long possession—Defendant must be proved to be trespasser—Defendant must be deemed to be in permissive possession when owner supports him.

Where, in a suit for ejectment, the title to the property is admittedly with a third party and plaintiff's claim is based only on long possession, the plaintiff cannot succeed unless he proves the defendant to be a trespasser.

The fact that the defendant's possession is not derived by any settlement with the owner will not constitute him a trespasser, when, as a matter of fact, he is supported by the owner in the litigation. The defendant must then be considered as a permissive occupant and in possession co-ordinate to that of the plaintiff and not liable to be ejected by the latter.

[P 382 C 1]

(b) Civil P. C. (5 of 1908), S. 100—Question of being trespasser is one of law.

The term "trespasser" is a term of law, and it is competent for the High Court to examine in

second appeal whether the finding of the lower Court that a person was a trespasser, is correct on the evidence tendered at the trial.

[P 382 C 1]

Pugh—for Appellant.

Baikuntha Nath Mitter—for Respondent.

Judgment.—The plaintiff sues for a declaration of title to, and recovery of possession of, a tank of which the Raja of Jharia is the admitted landlord. The defendant is a coal company and pleads permissive occupation from the landlord. Both the Courts below have found that the plaintiff has been unable to prove the title which he set out in his plaint, namely, that he has a niskar tenancy in the tank, but they have found that the plaintiff and his predecessors have been in possession of the tank for more than 12 years and that, the defendant being a trespasser, the plaintiff is entitled to get the relief which he claims. It is admitted by the learned vakil for the respondent before me that the case rests upon the plaintiff's title by long possession only. Now in order to succeed on the strength of long possession the plaintiff must show that the defendant is a trespasser. It is true that the learned Court of Appeal below finds that no settlement was made in favour of the defendant by the assistant manager of the Raja and that the defendant is actually a trespasser; but the term "trespasser" is a term of law and in second appeal it is competent for me to examine whether the defendant may in law be described as a trespasser. Now the learned Subordinate Judge himself states in the concluding part of his judgment that the defendant is being supported in these proceedings by the landlord. If that is so it is impossible to see how the defendant can be called a trespasser. The defendant must be considered a permissive occupant and in possession co-ordinate to that of the plaintiff. The case therefore that the plaintiff makes of long possession cannot prevail against the defendant. In this view of the case the decree of the learned lower Court must be set aside and the appeal decreed with costs. The suit will be dismissed with costs.

V.S./R.K.

Appeal decreed.

A. I. R. 1916 Patna 382

ATKINSON AND KINGSFORD, JJ.

Mt. Mahasunder Kuer and another — Objectors—Appellants.

v.

Ram Ratan Prasad Sahi—Petitioner—Respondent.

First Appeal No. 512 of 1913, Decided on 27th June 1916, from decision of Dist. Judge, Saran, D/- 18th September 1913.

Will — Probate — Question of adoption cannot be decided in probate proceedings.

It is not within the province of a probate Court to inquire into the title of a testator to the properties covered by his will. The question whether or not a person was adopted by a testator is not a matter which could be decided in a probate proceeding : 20 Bom 210, Dist.

[P 383 C 2]

Ganesh Dutt Singh—for Appellants.

S. P. Sinha and Rajendra Prasad — for Respondent.

Kingsford, J.—This appeal arises out of a will executed by one Ram Bhanjan in the year 1893. The contest lies between one Ram Ratan, the respondent, who propounds the will, and three daughters of Ram Bhanjan, who are the appellants before us. Ram Ratan appears to have been an adopted son of Ram Bhanjan, and he propounds the will in question as legatee and devisee thereunder. The will was executed on 6th September 1893, and it was registered at the village of the executant three days later in the presence of the Sub-Registrar, whose endorsement is upon the document. It appears that on 14th September 1893, Umrao Kumar, the wife of the testator, filed an application for registration of her name in the Collectorate. Ram Bhanjan died a month later. On 3rd February 1894 Umrao's name was registered in respect of the properties. On 23rd June 1897 she applied for Letters of Administration, which were granted to her accordingly six months later. Umrao appears to have died in the year 1912, and after her death the appellants filed an application for revocation of those letters. That application was granted in March 1913. Shortly afterwards the respondent Ram Ratan applied for probate. The appellants entered a caveat, but probate was granted on 18th September 1913. The present appeal is from that order.

The first contention raised before us by the learned vakil for the appellants is, that the document is not a will. The document states that Ram Ratan is the adopted son of the testator, and provides that after the testator's death Ram Ratan is to have possession of the properties, and that he is to manage them in consultation with the testator's wife, Umrao, during her lifetime, and that nothing done by Ram Ratan without Umrao's permission is to be valid. After the death of Umrao it is provided that the will shall operate solely in favour of Ram Ratan. We were referred to p. 24 of Mozumdar's Hindu Wills, and our attention was called to three tests applicable to a will. I do not think it was seriously contended that the will in question was not a revocable document and certainly it cannot be said that it does not contain a disposition of property. It was however contended that there was no existence of any intention in the testator's mind, that the will should take effect after his death. As I have already indicated, an application was made for the registration of Umrao's name before Ram Bhanjan's death, and in the application filed by Umrao it is stated that a petition was also filed by Ram Bhanjan assenting to her application. I am not prepared to hold that these circumstances are any indication that Ram Bhanjan intended that the will, so far as the respondent was concerned, should take effect before his death. We were referred to the ruling in a *Reference by the Collector and Superintendent of Stamps, Bombay* (1). The circumstances of that case are clearly distinguishable; for the document there considered was not a will at all; it was merely a trust-deed which was contemplated to operate during and beyond the lifetime of the executant. It cannot be said that that description is applicable to the document in the present case.

A further contention was, that as the respondent had been adopted in Dattaka form by Ram Bhanjan, he became a coparcener in the joint family property, and as such was entitled to that property upon the testator's death, and therefore there was no power in the testator to bequeath to Ram Ratan property to which the latter was already entitled to succeed. Now this argument raises the

1. (1896) 23 Bom 210.

question as to the title of Ram Bhanjan to the property which the will purports to devise. There is a long series of rulings, to which reference is made at p. 762 of Mozumdar's work, the effect of which clearly is that it is not within the province of a probate Court to inquire into the title of the testator in the properties covered by the will. That being so, I am of opinion that the learned District Judge was perfectly right in ruling that the question, whether or not Ram Ratan was adopted by Ram Bhanjan, was not a matter which he could decide in the present suit. It is, in fact, not open to us to consider the matter at all. The next contention was that the will was not properly proved. It appears that the document was attested by two witnesses named Mangal Prasad and Sheoraj Misser, both of whom are since dead. It was also attested by a third man, Mathura Rai, whose signature was attached to it by the above Mangal Prasad. Mathura Rai has given evidence in the present case. It seems that he was illiterate at the time of the execution of the will, but he has since learnt to write. He states that the will was duly executed by Ram Bhanjan, and that it was duly attested by Mangal Prasad and Sheoraj Misser. He has no doubt that the document shown to him in Court is the actual will which he saw so executed and attested. I am unable to find any reasons for discrediting the evidence of this witness, or for finding that it does not amount to sufficient proof of attestation.

The third contention was that the signature of Ram Bhanjan upon the will was a forgery. It is said that there are some documents which contain his genuine signature, and that if these documents, which are not actually before us, were compared with the signature on the will, they would show that the latter is not genuine. I do not think it is necessary for us to give the appellants any further opportunity of producing those documents before us, because, in my opinion, the question whether or not the signature is genuine is set at rest by the endorsement of the Sub-Registrar upon the deed. That endorsement is to the effect, that execution was admitted by Ram Bhanjan in the presence of the Sub-Registrar, and this, as I have already said, took place three days after

the actual execution. In my opinion therefore there are no circumstances which would entitle us to interfere with the grant of probate. This was a valid will executed by a competent testator, and I would therefore dismiss the appeal with costs measuring the hearing-fee at 8 gold mohurs.

Atkinson, J. — I entirely concur with the judgment of my learned colleague.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 384 (1)

MULLICK, J.

Gobardhan Sahu — Defendant—Appellant.

v.

Bulkhan Mahton — Plaintiff — Respondent.

Second Appeal No. 1555 of 1914, Decided on 26th April 1916, from decision of Sub-Judge, Muzaffarpur, D/- 4th March 1914.

Hindu Law—Joint family—Property jointly acquired and thrown in common stock become joint family property — Survivorship applies.

Under the Hindu law property jointly acquired and thrown into the common stock is subject to succession by survivorship, at least as between parties who acquired the property. [P 384 C 2]

Saroshi Chandra Mitter—for Appellant.

Mohammad Mustafa Khan—for Respondent.

Judgment. — The plaintiff is one of the four sons of Gobind. It has been found by the lower appellate Court that the plaintiff and his brothers Dilchand, Mahabir and Sukhu lived together joint in food. Dilchand and Mahabir are dead and Sukhu has executed a mortgage in favour of defendant 2 for the whole of the shop in which the plaintiff and his brothers resided. Defendant 2 having advertised this house for sale in execution of his mortgage decree, the plaintiff has brought the present suit for a declaration of his half share in the house and for an injunction. The lower appellate Court has given the plaintiff a declaration affirming the decree of the Munsif. This second appeal has been preferred by defendant 2.

The only point taken is, that it having been found that the plaintiff and his three brothers purchased this house out of their joint earnings and that there was no nucleus of ancestral property, the plaintiff's share is only $\frac{1}{4}$ th. The contention is that there can be survi-

vorship only in respect of ancestral property and that property acquired jointly by the four brothers goes by succession, and not by survivorship. The learned vakil for the appellant admits that he has no authority for this proposition. On the other hand, the observations of Mr. Mayne at p. 354 of the 8th Edn. of his book on Hindu Law seem to point to the conclusion that property jointly acquired and thrown into the common stock is subject to succession by survivorship, at least as between the parties who acquired that property. In this case therefore upon the death of Dilchand and Mahabir, the plaintiff's share became half and that of Sukhu half. The decree therefore declaring the plaintiff to have a half share, is correct. The appeal fails and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 384 (2)

MULLICK, J.

Kishun Deyal Singh and others—Defendants—Appellants.

v.

Kishun Deo Jha and others—Plaintiffs—Respondents.

Second Appeals Nos. 768 and 1522 of 1914, Decided on 5th April 1916, from decision of Dist. Judge, Purneah, D/- 20th December 1913.

Limitation Act (9 of 1908), Sch. 1, Arts. 120, 36 and 115—Suit by co-sharer to recover share in profits of ferry—Art. 120 and not Art. 36 or Art. 115 applies.

A suit by one co-sharer against another to recover his share in the profits of a ferry is governed by Art. 120 and not by Art. 36 or Art. 115, Lim. Act: 23 Cal. 799, Ref. [P 385 C 1]

Harihar Pasad Singh—for Appellants.

Kulwant Sahai—for Respondents.

Judgment. — The plaintiffs are co-sharers of a certain ferry and sue the defendants, first party, who are certain other co-sharers, for their share of the profits of the ferry for the years 1315 to 1317 F. S. The Subordinate Judge gave a modified decree reducing the plaintiffs' claim as to the profits to a lower figure than that alleged in the plaint. That decree was upheld on appeal by the District Judge. The defendants first party now prefer the present second appeal before me. The first contention urged by the learned vakil on their behalf is that the claim for 1315, 1316 and 1317 was barred under Art. 36, Lim. Act.

It appears, however, that in the Courts below and in the grounds of appeal before me only the claim for 1315 is alleged to have been barred under Art. 36. The learned vakil for the appellants says that this was an error. However that may be, it is quite clear that Art. 36 has no application. There was no malfeasance, misfeasance or non-feasance by the defendants. The defendants were co-sharers of the plaintiffs and it is no one's case that defendants dispossessed the plaintiff or committed any tort. The case of *Robert Watson v. Ram Chand Dutt* (1) is indistinguishable from the present case and governs the period of limitation, which is six years under Art. 120.

The next contention is that if Art. 36 does not apply, then Art. 115 applies. Now this argument was not advanced in any of the Courts below and is now taken for the first time. It has clearly no substance because there is no proof of any express or implied contract on the part of the co-sharer defendants to pay to the plaintiffs their share. The appeal fails and is dismissed with costs. This judgment will also govern Appeal No. 1522 of 1914.

V.S./R.K.

Appeals dismissed.

1. (1896) 23 Cal 799.

A. I. R. 1916 Patna 385

MULLICK, J.

A. B. Cheoditti—Appellant.

v.

Quadress—Respondent.

Second Appeal No. 635 of 1914, Decided on 14th April 1916.

Bengal Tenancy Act (8 of 1885), S. 65—Road cess is included in definition of rent—Decree for road cess is first charge—Auction-purchaser in such decree supersedes mortgagee.

The definition of rent in the Bengal Tenancy Act includes road-cess and therefore under S. 65 of the Act a decree for road-cess is a first charge upon the tenure. [P 385 C 2]

An auction-purchaser in execution of a decree for road-cess has a title paramount to a mortgagee of the tenure. [P 385 C 2]

Susil Madhav Mullick—for Appellant.

Lalit Mohan Ghose for *Naresh Chandra Sinha*—for Respondent.

Judgment.—This is a mortgage suit. The original mortgagors were (i) defendant 3, (ii) the daughter of defendant 3, now deceased, whose interest is said to have devolved upon defendant 1, and (iii) defendant 2, the daughter of the sister

of defendant 3. The property is said to have been the property of one Nainbati Ojhain, who was the step-mother of the father of defendant 3.

The Subordinate Judge who tried the suit in the first instance has not adjudicated upon the respective titles of defendants 1, 2 and 3. He considers it immaterial to determine whether defendant 3 was the sole owner of the mortgaged properties or whether defendants 1 and 2 have any interest therein. Defendant 4 is interested only in a piece of brahmottar land measuring 15 bighas comprised in the mortgage. He is admittedly the proprietor of the estate within which that brahmottar is situate and he, in execution of a decree for road-cess, obtained against defendant 3 alone, brought the brahmottar to sale and purchased it himself in December 1904, that is, three years after the mortgage. The plaintiff mortgagor brought his suit not only against defendants 1, 2 and 3, but also against defendant 4 and both Courts below have given a decree for sale against all the defendants. Defendant 4 maintained that he was not a necessary party to the suit and that by virtue of his auction-purchase he had obtained a title paramount, but that plea was rejected by both Courts, and hence the present second appeal by him.

The only point argued is whether or not the auction-purchase of defendant 4 gave him a title paramount to the mortgage. It is clear from the definition of "rent" in the Bengal Tenancy Act that rent includes road-cess and therefore under S. 65 a decree for road-cess is a first charge upon the tenure. The provisions of Ss. 47, 64-A and 64-B, Road-cess Act (9 B. C. of 1880), also support this view. That also has been held to be the law in *Nobin Chand Nuskar v. Bansenath Paramanick* (1). Defendant 4 obtained his tenure at the auction-sale free from encumbrances and is not affected by the mortgage charge. The decree therefore in the mortgage suit will be limited only to defendants 1, 2 and 3 and defendant 4 will be dismissed from the suit with costs in all Courts. The appeal succeeds and is decreed without costs, as nobody appears for the respondents.

V.S./R.K.

Appeal decreed.

1. (1894) 21 Cal 722.

A. I. R. 1916 Patna 386 (1)

MULLICK, J.

Ramtahal Sahu—Appellant.

v.

Ganoo Sahu—Respondent.

Second Appeal No. 3103 of 1914, Decided on 25th April 1916.

Civil P. C. (5 of 1908), S. 102—Claim below Rs. 500 being partly given up—No second appeal lies.

The plaintiff sued for cancellation of a kabuliyat against defendant 1 and for damages to the extent of Rs. 250 as against defendants 1 and 2. In second appeal the plaintiff abandoned his claim as against defendant 1 :

Held : that no second appeal lay as against defendant 2 alone, as the claim against him was a matter cognizable by a Court of Small Causes exclusively. [P 386 C 1]

Gour Chandra Pal—for Appellant.*Susil Madhav Mullick*—for Respondent.

Judgment.—The plaintiff is a person who states that he has executed a kabuliyat in favour of defendant 1, who is the mokuraridar of a certain *hat*, giving him the right to realize a certain cess or toll from persons who come to sell their produce at the *hat*. Defendant 2 is a person who is alleged to have executed another kabuliyat in favour of defendant 1 in respect of the same right. The plaintiff sues defendant 1 for cancellation of his kabuliyat for breach of condition and defendants 1 and 2 for damages. The learned District Judge finds that the cess is illegal and has dismissed the whole suit. The present second appeal is preferred by the plaintiff. It is to be noted at the outset that the plaintiff has not joined in this appeal the mokuraridar (defendant 1) ; therefore so far as the cancellation of the kabuliyat given to defendant 1 and damages against defendant 1 are concerned, the plaintiff cannot get any relief. There remains the claim so far as it concerns defendant 2. Now defendant 2 is with regard to the plaintiff a complete stranger and the suit as against him must be treated purely as one for damages. Now the amount of damages claimed is Rs. 50 a year for five years, that is Rs. 250, a matter cognizable by a Court of Small Causes exclusively; therefore under S. 102, Civil P. C., no second appeal in regard to this claim lies. The appeal therefore as regards defendant 2 is dismissed with costs.

V.S.R.K.

*Appeal dismissed.***A I. R 1916 Patna 386 (2)**

MULLICK, J.

Kesho Prasad Sinha Bahadur—Plaintiff—Appellant.

v.

Lalji Ray—Defendant—Respondent.

Second Appeal No. 3792 of 1914, Decided on 7th April 1916, from decision of Dist. Judge, Saran, D/- 27th August 1914.

Landlord and Tenant — Rent — Decree — Court not competent to specify manner of execution—Landlord entitled to choose manner of execution.

It is not competent to a Court to direct in what manner a landlord shall execute his decree for rent and he cannot be compelled to proceed first against the holding and then against the person of the tenant. [P 386 C 2]

Krishna Sahai for *Provash Chandra Mitter* and *Susil Madhab Mullick* — for Appellant.*Harnarayan Prasad*—for Respondent.

Judgment.—The plaintiff is the landlord ; the defendant is the tenant. The Munsif found that the defendant was in possession of the holding and decreed the suit directing however that the landlord should proceed in execution first against the holding and then against the person of the tenant. On appeal the learned District Judge found that the landlord had dispossessed the defendant from the holding but, instead of dismissing the suit outright, he proceeded to affirm the decree of the Munsif.

The plaintiff now appeals before me and urges that the direction restricting his right to proceed at his direction, either against the holding or against the person of the tenant is wrong. This contention must prevail. All the authorities in our Courts have laid down that it is not competent to a Court to direct in what manner the landlord shall execute his decree for rent and that he cannot be compelled to proceed first against the holding and then against the person of the tenant. On the other side there is no authority whatever and the learned vakil for the respondent relies on equity. He urges that as the tenant has been dispossessed by the landlord, it is only fair that the landlord should proceed against the holding first. But if the tenant has been dispossessed by the landlord, then no decree for rent can be made against him at all and it was competent to the tenant to prefer an appeal against the whole decree. Not

having appealed against the decree, which is a decree for rent to which S. 65 Ben. Ten. Act applies, the tenant cannot now say that we should restrict the operation of the decree in any particular way. S. 65 must take its course. The decree of the learned Judge below is set aside and it is directed that the suit be decreed with costs for the arrears of rent and cesses claimed, with 10 per cent. damages. The appeal is decreed with costs.

V.S./R.K.

Appeal decreed.

A. I. R. 1916 Patna 387

ATKINSON, J.

Mahomed Farid and others — Defendants—Appellants.

v.

M. Hakim Shah Abdul Wahab and others — Plaintiffs and Defendants — Respondents.

Second Appeal No. 1952 of 1912, Decided on 5th June 1916.

(a) Record of Rights—Entry in—Presumed to be correct.

A Record of Rights should be presumed to be accurate until it is proved to be incorrect.

[P 387 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 103—Record of Rights, value of.

A Record of Rights is evidence not only between landlord and tenant, but in all cases where the subject-matter with which it deals is in dispute.

[P 388 C 1]

Chandra Shekhar Prosad Singh—for Appellants.

Judgment.—This is an action between two adjoining zamindars with regard to the possession of a certain area of land amounting to 3 bighas 9 cottas and 10 dhurs. The question is as to whether they fall within the area of the village of Kulharia or whether they fall within the area of the village Kazichak. If they fall within the area of the latter then they belong to the defendants; if, on the other hand, they fall within the area of Kulharia then they belong to the plaintiffs. The plaintiffs claimed some nine plots as forming their property making the entire area of 3 bighas 9 cottas and 10 dhurs; but of these, six admittedly are and have always been, the property of the defendants; and this appeal relates only to the adjudication of the appellate Court as to plot 418 and parts of plots 411 and 419. The Munsif dismissed the case.

The learned Judge on appeal reversed the finding of the Munsif and granted a

qualified decree, holding that plot 418 and parts of plots 411 and 419 fell within the boundary of the village Kulharia and that they, consequently, constituted the property of the plaintiffs in this action; and he therefore gave a decree in respect of plot 418 and parts of plots 411 and 419 which amounted in area to 3 bighas 15 cottas and 5 dhurs. This makes a difference, between what the plaintiff claimed by his plaint and what he got under the judgment by appeal, of 18 cottas or 1 bigha.

The defence put forward before the learned Judge on appeal, was based mainly on the published Record of Rights; and undoubtedly in the published Record of Rights plot 418 and parts of plots 411 and 419 (given to the plaintiffs by the decree) are by the Record of Rights recorded and marked as being within the limits of the village Kazichak and therefore the property of the defendants. The Record of Rights seems to have been published between the dates of the finding before the Munsif and the decision before the Judge on appeal. This is of importance, having regard to the weight which the learned Judge attaches to the pleading of the defendants in para. 7 of the written statement and the pleading of the plaintiff in para. 3 of the plaint. But the Record of Rights is there. It is a document prepared by a State Official for State purposes in an open and public manner and the law requires that it should be presumed to be accurate until it be proved to be incorrect; and the person who appears recorded in the Record of Rights is not to have his rights lightly frittered away in the absence of legal proof. No legal proof, so far as evidence is concerned, was given to displace the legal effect of the admitted entry in the Record of Rights.

The learned Judge adopted a somewhat unusual procedure because, inasmuch as both the parties, that is, the plaintiffs and the defendants, had stated by their pleadings, that their case was based upon the Survey Settlement Map of 1846, he looked at that map and compared it with the corresponding boundary as shown by the recent survey; and where it differed he drew the line accordingly in favour of one or the other of the parties, as the variance in the marking of the map showed a difference

in favour of one or the other, irrespective altogether of the Record of Rights. It is from the map so marked that he comes to the conclusion that the Record of Rights is wrong; and finds as a fact without proof that the Record of Rights is based on evidence as to possession which is not of a satisfactory character. The learned Judge knows nothing of what evidence was given before the Revenue Officer. He had the map marked as I have indicated, prepared for the purpose of this case at his own instigation. It may have been right or it may have been wrong, but it appears to me to have frittered away the provisions of the statute. I doubt if the Judge could, behind the back of the parties to the Record of Rights, seek to have the accuracy of the record impeached upon one of the vital parts of the record. The learned Judge says again :

"I am not disposed to follow the Record of Rights as to plot 419 when there is no satisfactory evidence of possession,

and he says the same again with regard to part of plot 411 :

"I think it better not to follow the entry in the Record of Rights, for that entry seems to have been based on evidence that was insufficient."

I think the learned Judge wrongly assumed a duty and an onus which the law never cast upon him; and that as the defendants produced the Record of Rights and as the Record of Rights was in their favour, I think that there was no evidence in law to warrant the Judge on appeal in finding against the contention put forward by the defence.

The learned Judge says, at p. 14, that when he considers on which side of the boundary line a portion of the plot may fall, he thinks that great weight is to be attached to the part that is most upon one side of the line; and he adds that the presumption is very strong that the possession of this small portion has gone with the possession of the larger portion. Certainly in the case of Nos. 411 and 419, which he decided as falling within the village Kulharia, he adopted and acted upon the very converse of the principle which he laid down for himself to follow as a guide. I do not at all agree with the argument addressed to me that the Record of Rights is only evidence as between landlord and tenant. I think it is evidence in all cases where the subject-matter with which it deals

is in dispute. In my opinion the learned Judge had not before him either evidence or materials to show that the Record of Rights was incorrect. I think the defendants have shown that they have been in possession for a considerable number of years in accordance with the Record of Rights. I shall allow this appeal with costs. And as the evidence before the learned Judge was not, in my opinion, sufficient in law to justify him in discarding the Record of Rights and the entries therein, I will reverse his decision. I reverse the decision of the lower appellate Court and dismiss this action with costs.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 388

MULLICK AND ROE, JJ.

Rang Behari Lal and others—Plaintiffs—Appellants.

v.

Racheya Lal—Defendant—Respondent.

Second Appeal No. 3208 of 1914, Decided on 27th March 1916, from decision of Dist. Judge, Muzaffarpur, D/- 6th and 9th June 1914.

Civil P. C. (5 of 1908), O. 41, Rr. 17 and 19—Appeal dismissed for default—Better of two Counsels absent from station—Adjournment refused—Other counsel refusing to appear—Gross negligence of counsel—Order dismissing appeal for default was not set aside.

Adjournment of an appeal was sought on the ground that the better of the two vakils both of whom represented the appellant, was absent from the station. The Court refused adjournment and proceeded to hear the appeal. The other vakil declined to appear with the result that the appeal was dismissed for default:

Held: (1) that the vakil's conduct amounted to a very gross neglect of his client's interests: (2) that there was no ground for setting aside the order dismissing the appeal for default.

[P 389 C 1]

Baldeo Narain Sinha—for Appellants.
Saroshi Charan Mitter—for Respondent.

Roe, J.—This appeal is directed against two orders of the District Court at Muzaffarpur, one dated 6th June 1914 rejecting an application for re-hearing of an appeal, the other dated 9th June 1914, disposing, ex parte of a cross-appeal in connexion with the same matter. The ground upon which the order of 6th June is attacked is that it is shown that the reason of the appellant's failure to prosecute his case was some slight neglect

on the part of his legal advisers, and that this neglect, being the first committed in the case, should have been condoned. It appears that a karpardaz in the plaintiff's employ and the vakil who had argued the case in the lower Court were present in Muzaffarpur and presumably in a position to go on with the case on the day fixed. The appellant, on the pretext that his best karpardaz and a pleader better than the one originally employed were respectively ill and absent for three weeks from the station, applied for an adjournment. On being told that they must go on with the case, the karpardaz and the pleader in Muzaffarpur declined to appear in the District Judge's Court. I regard this as very gross neglect of the client's interests. I am not of opinion that justice demands that the case should be reheard. Condonement of such negligence can result only in its continuance.

With regard to the cross-appeal disposed of by the order of 9th June, I again note gross neglect of the interests of the appellant, if indeed there was in his case anything but a desire to postpone, as long as possible, the evil day of restitution of the profits of the property that he had wrongfully acquired. Ample notice was given to his pleaders that the question of mesne profits would be considered on 9th June. The pleaders deliberately absented themselves from Court taking it for granted that the District Judge's orders dismissing the main appeal for default would be upset. Upon the arguments adduced before the learned District Judge, it was obvious that the cross-appeal must be decreed. Mesne profits had been given at the original hearing of the case by two Courts arriving at concurrent conclusions of fact and there was no interference with those orders in appeal to the High Court at a former hearing. Upon all the merits of the case the appeal fails. The appeal against the order for mesne profits is dismissed with costs ad valorem. I would make no other order as to costs of the appeal against the order of the 6th June, refusing to restore the main appeal.

Mullick, J.—I agree that the appeal should be dismissed.

v.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 389

MULLICK, J.

Gur Sahai Mahto and another—Defendants—Appellants.

v.

Keshwar Sahu — Plaintiff — Respondent.

Second Appeals Nos. 1867 and 2159 of 1914, Decided on 6th April 1916, from the decisions of Dist. Judge, Patna, D/- 3rd April 1914.

Bengal Tenancy Act (8 of 1885), Ss. 29 and 179—Landlord and Tenant—Kabuliyat—Agreement to pay enhanced rate of rent—Mukarrari Patta granted to tenant—Notice by tenant to landlord to perform certain acts in terms of patta—S. 29 held inapplicable—Notice amounted to ratification of kabuliyat—Tenant estopped from pleading under influence.

By a kabuliyat a tenant agreed to pay an enhanced rate of rent and in consideration thereof the landlord passed a mukarrari interest in his land within the meaning of S. 179, Ben. Ten. Act. Subsequent to the execution of the kabuliyat the tenant served a notice upon the landlord to sink a pakka well in accordance with the terms of the kabuliyat:

Held: that S. 29, Ben. Ten. Act, did not apply to the case, inasmuch as the kabuliyat created a permanent mukarrari interest within the meaning of S. 179 of the Act. [P 390 C 1]

Held, also: that the notice amounted to a ratification of the kabuliyat and it was not subsequently open to the tenant to plead that the kabuliyat was executed under undue influence. [P 390 C 1]

Genesh Datt Singh—for Appellant.

Syed Mohammad Tahir—for Respondent.

Judgment.—The plaintiff is the landlord, the defendant is the tenant. The plaintiff brought the two suits out of which these two appeals before me arise, for the rent of two holdings measuring, respectively, 9 bighas and 6 bighas at a rental of Rs. 5 per bigha. The defence was that the rent of the former holding was Rs. 10-6-0 and of the latter Rs. 7-8-0. The plaintiff claimed upon the strength of a patta and kabuliyat dated 12th June 1906. The Munsif held that the kabuliyat was executed under undue influence and decreed the suits at the rates admitted by the tenant. The plaintiff appealed and succeeded in the Court of the Additional District Judge in getting a decree at the full rates claimed. The defendants now prefer the present second appeals. It has been found as a fact by the learned Additional District Judge that the kabuliyat executed by the defendants was vitiated by undue influence, but the learned Additional District

Judge has held that the kabuliyat was subsequently ratified by the defendants and that, as by the terms of the kabuliyat a permanent mukarrari lease was created, the plaintiff is not barred by the restrictions laid down in S. 29, Ben. Ten. Act, from getting the rent which has been decreed. The effect of the decree is to give a total increase of Rs. 58 upon the two holdings.

Now the first point urged by the learned vakil for the appellants is that there was no election or ratification by the defendants and that, therefore, it is not a case which comes under S. 19 (a), Contract Act. Now it appears that about 4 years after the kabuliyat was executed, namely, on 2nd February 1910, the defendants through their pleader served the landlord with a notice; that notice recited the fact that on 12th June 1906 a kabuliyat was executed by which the defendants had agreed to pay rent at the rate of Rs. 5 per bigha on the two holdings and the landlord had agreed to sink a pakka well for irrigating the lands at his own expense and to do certain earthwork, and that as the landlord had failed to carry out his part of the contract, the land was not yielding as much as it ought to. The notice further called upon the landlord to sink a pukka well and to raise the earthwork within one month from the receipt of the notice and informed him that in the event of failure to do so, the defendants would take such legal proceedings for the reduction of the rent as might be considered proper. Now it is clear that this notice was a ratification of the kabuliyat. I agree with the learned Additional District Judge that the intention of the defendants was to accept the kabuliyat on condition that the landlord carried out his part of the contract. It is no longer open to the defendants to plead that there was undue influence, provided the landlord has sunk the well and done the earthwork which he promised to do.

It is, however, contended that even if the kabuliyat has been ratified the enhancement, being illegal, cannot be enforced, and this brings me to the second point raised by the learned vakil for the appellant. He relies on S. 29, Ben. Ten. Act, but it is clear that S. 29 has no application, because the kabuliyat and patta created a permanent mukarrari lease within the meaning of S. 179 and,

by the express terms of the Statute, S. 29 is not applicable to a lease of this kind. The patta and its counterpart, the kabuliyat, recite that the tenants are to have their perpetual status at a fixed rate of rent of Rs. 5 per bigha, and that the landlord is not to have any power of enhancement. It is true that the document does not say that any heritable and transferable status is given but it is quite clear from the terms of the document that the intention of the landlord was to create what is commonly known as a permanent mukarrari interest. That being so and the question really depending upon the construction of the document, I agree with the learned Additional District Judge that the enhancement was not governed by S. 29, Ben. Ten. Act. The learned Judge below has added a further ground in support of his decree. He finds that the landlord has since 1318 fasli, by sinking the well and doing earthwork, made improvements within the meaning of S. 29 and that he is, therefore, entitled to the enhanced rent. But it is to be noticed that the suit is not based on a claim for enhancement for improvements and in order to make out such a claim it is necessary to comply strictly with the provisions of S. 33, Ben. Ten. Act. This the landlord has not done; moreover, there was no case of enhancement made in the plaint or litigated in the Court of first instance and in my opinion, the learned Judge's observation that the enhancement may also be supported on the ground of improvements is wrong. But for the reasons already given by me the decree is correct and the result is that the two appeals must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R.. 1916 Patna 390

ROE AND JWALA PRASAD, JJ.

Sarjug Lal and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 73 of 1916, Decided on 26th May 1916

Criminal P. C. (5 of 1898), S. 106—Lathis are "arms."

Lathis are "arms" within the meaning of S. 106, Criminal P. C. [P 391 C 2]

Pugh and G. C. Pal—for Appellants.
Manuk—for the Crown.

Judgment.—In this case we are asked to consider the possibility of reducing the sentences passed upon 12 Hindu accused, who have been convicted under S. 143 of being members of an unlawful assembly whose common object was to prevent by force the exercise by the Mahomedans of Barawan of their right to sacrifice cows upon the occasion of the Bakr-Id of last year. We have considered carefully the facts of the case. In our view, one of the most important considerations is the probable effect of a reduction of these sentences upon the peace of that locality. In considering that question we attach great importance to the opinion of the District Magistrate that a reduction of the sentences may result in still further difficulties in future. It is to be regretted that the District Magistrate in showing cause should have based his objections to the reduction of sentences upon an assertion that the Jury had taken too lenient a view of the matter. We are conscious of this and regard the sentences solely from the point of view of the Jury's verdict. That verdict is that the accused were members of an assembly making not a peaceful but a warlike demonstration, and the evidence shows that the assembly was armed with lathis and it is clear on a consideration of all the facts of the case that the only reason why the lathis were not used was that the Mahomedans forewent their rights to make any sacrifice that day. In the case of those accused who were either able-bodied men or were prime movers in the matter we are not disposed to interfere.

There are, however, two men Makund Singh aged 80 and Ram Partap Singh aged 70, who do not appear to have taken any very prominent part in the proceedings. Their sentences will be reduced to a sentence of three week's rigorous imprisonment each. Of the remaining accused Bhagwat Dubey is aged 76, Jamuna Prasad aged 19 and Sarju Prasad aged 22. Had they not taken a prominent part in the proceedings their respective age and youth might be good reason for reducing their sentences also. But it is clear from the evidence of the police witnesses and of the chaukidar that these three men were prime movers in the collection of this unlawful assembly and in conduct-

ing it to Barawan for the purposes of this warlike demonstration. We are not disposed, therefore to interfere on their behalf. With regard to the application that the orders passed under S. 106 are not justified by the facts we are satisfied from the findings of the Jury that the assembly was an assembly with an evident intention of committing a breach of the peace and from the evidence that it was an assembly of armed men: lathis are undoubtedly arms within the meaning of this section. We therefore see no reason to interfere with the order passed under S. 106.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 391 Full Bench

CHAMIER, C. J., SHARFUDDIN AND
ATKINSON, JJ.

Jugal Chandra Mazumdar, In the matter of.

Reference No. 3 of 1916, Decided on 1st June 1916.

Legal Practitioners Act (18 of 1879), S. 13—Receiving instructions from stranger without inquiry is misconduct.

A Pleader, who receives instructions from an unauthorized person, who is neither the recognized agent of the party for whom he is retained, nor the guardian, servant, relative or friend of such party authorized to give instructions on his behalf, without making proper inquiry, is guilty of misconduct under S. 13, Legal Practitioners Act. [P 393 C 2]

Pugh, K. P. Jayaswal, P. R. Dass, Sishir Kumar Mitra, Hari Bhushan Mukerji, Abani Bhushan Mukerji and Gour Chandra Paul—for Petitioner.

Judgment.—Jugal Chandra Mazumdar, a pleader practising in the Manbhum district, was charged under Ss. 13 and 14, Legal Practitioners Act 1879, with having taken instructions in a case from one Baishnab Bhuiyan, who was neither the recognized agent of the parties for whom he was retained, nor their guardian, servant, relative or friend, authorised to give instructions on their behalf. The Munsif after inquiry found that the charge was proved and he has reported the case to this Court through the District Judge of Manbhum, with a recommendation that the pleader should be dismissed. The learned District Judge supported this recommendation, being of opinion that the facts not only establish the charge which was drawn up by the Munsif, but justify a finding that the pleader was guilty of fraudulent or

grossly improper conduct in the discharge of his professional duty within the meaning of S. 13 (b) of the Act. We may say at once that inasmuch as the pleader was not charged with fraudulent or grossly improper conduct this finding must be disregarded. At the same time we may say that having examined the evidence, we should not have been prepared to find that charge proved. We shall confine ourselves to the charge framed by the Munsif. The facts are shortly as follows:—One Kedar Nath Maduk, his brother Bishanath Maduk and the latter's son Mahendro, were members of a joint family. A mortgage was made by one Ban Bhuiyan in favour of Mahendro alone. After the death of Kedar a suit was brought by his heirs upon the mortgage against the sons of Ban Bhuiyan, who were infants and were described as being under the guardianship of their mother. Mahendro and his father Bishanath were impleaded as proforma defendants.

Before calling upon the defendants to file written statements, the Munsif issued a notice to the mother of the infant defendants presumably with the object of appointing her to be their guardian ad litem, and 22nd May 1915, was fixed for her appearance. On that date the pro forma defendants Bishanath and his son Mahendro filed a written statement, in which they pleaded that the plaintiffs had no interest in the mortgage-money and further that the mortgage-bond had been discharged. The plaintiffs' case as set out in the plaint was that the mortgage-money had been advanced out of the funds of the joint family of which the father had been a member. On the same day a written statement very much like that filed by the pro forma defendants was filed on behalf of the infant defendants 1 and 2 by Jugal Chandra, who signed his name on the back of the vakalatnama, on the written statement, and on a list of documents, with which was produced a receipt purporting to have been granted by Ban Bhuiyan for the mortgage-money. On 21st December 1915, a written statement was filed through another pleader on behalf of the minors by their mother in which she said that the money had been advanced by the joint family and that it had been repaid to Mahendro alone

and she contended that the plaintiffs should have sued Mahendro. Along with her written statement she filed an affidavit and a petition in which she stated that Baishnab, who had signed the vakalatnama in favour of the Pleader Jugal Chandra, was not authorised to act on her behalf.

The plaintiffs shortly after that withdrew their suit saying that they would sue Mahendro. On 29th February 1916, (it does not appear why there was a delay of two months) the Munsif called for an explanation from the pleaders who had filed the conflicting written statements and a few days later he framed a charge against Jugal Chandra as stated above. Upon that Jugal Chandra put in a petition, in which he stated that he had been retained in the case by Baishnab Bhuiyan who had told him that he was a relative of the minors and had produced a Court summons, a copy of the plaint in the case and a receipt supporting his statement that the mortgage-money had been repaid, and he (the pleader) urged that there was nothing in the conduct or behaviour of Baishnab to lead him to think that he was not a relative of the minors or was not authorised to act on their behalf. A few days later Jugal Chandra was examined at length by the Munsif. He said that he had obtained the vakalatnama from Baishnab Bhuiyan, that the latter had told him he was a relation of the minors, that he had made inquiries of Mahendro, one of the defendants to the case, and that Mahendro also had told him that Baishnab was a relative of the minors.

He described the circumstances in which Baishnab had come to retain him at the Court-house and he alleged that acting on the instructions of Baishnab he had drawn up a written statement on behalf of the minors, and had filed it in Court on their behalf, and that throughout he had acted in good faith relying on the statements of Baishnab and Mahendro. We are unable to accept the statements of the pleader as true. Bishnab appears to be a cartman who was driving a cart for Mahendro on the day on which the written statement was filed. He may have gone with Mahendro to the pleader but he is, practically speaking, illiterate. He can with great difficulty sign his name. Mahendro is a

literate man and there can be no doubt that it was at the instance of Mahendro that the pleader accepted the vakalatnama and that Mahendro used Baishnab for his own purposes. The pleader's statement that he drafted the written statement in the case is evidently untrue. His clerks know nothing about the matter at all. The bulk of the written statement is in the handwriting of a man whose identity has not been disclosed, and the opening words of the written statement has been proved to be in the handwriting of the man who filed out the written statement filed on behalf of Mahendro and who is a relation of Mahendro's pleader. There can be little doubt that the written statement had been prepared before Mahendro and Baishnab went to Jugal Chandra and all that the latter did was to sign his name on it and on the vakalatnama and the list of documents. He took no trouble whatever to ascertain who Baishnab was and whether he was authorised to give instructions in the case. On his own showing he inquired of no one but Mahendro. In fact his own statement shows that he neglected his duty and disregarded the instructions issued by the High Court on the subject.

It has been proved that the mother of the minors was not in the village when the summons to her was taken there. She left it five or six years ago and is living in a village some eight miles away. She says she gave no instructions to Baishnab and Baishnab says that he received no instructions from her. Baishnab says that he signed the paper at the instance of his landlord Mahendro and gave no instructions to the pleader. Both the District Judge and the Munsif held that Baishnab did not receive instructions from the mother of the minors and we agree with the finding. It is clear that the pleader not only did not take any pains to ascertain whether Baishnab was authorised to retain him, but he did not even examine the receipt produced in support of the written statement. The receipt purports to have been signed on 5th March 1907, but it bears a one-anna stamp of the time of the present King. It does not appear to be a document nine years old, and there was much in the affair which would have excited the suspicion of any man

who had acted with ordinary care. In our opinion, there can be no doubt that Jugal Chandra Mazumdar made no inquiries as to the right of Baishnab to instruct him on behalf of the minors or their mother, that he did not prepare the written statement and that he accepted the vakalatnama at the instance of Mahendro. Mr. Pugh who has appeared on his behalf has urged us to treat him leniently on account of his youth and experience.

We have given due weight to these considerations. But we regret to say that the papers before us show that the pleader's conduct in the inquiry held by the Munsif disentitles him to any special consideration at our hands. When he was called upon to answer the charge he put in a false statement. Not content with this he actively obstructed the Munsif in the inquiry. It appears that at the outset he said that he would not appear and would take no part in it. Later, when the Munsif wished to show him to one of the witnesses he declined to come into Court and the witness had to be taken out of the Court to him. It was suggested that the pleader did in this case no more or less than is commonly done in similar circumstances in the mofussil. We trust that the conduct of this pleader does not represent the standard of care exercised by pleaders in such cases. It is unnecessary to enlarge upon the danger of pleaders taking instructions from unauthorized persons. Pleaders who do not take care to ascertain that the persons instructing them are entitled to do so must understand that such conduct is most improper and that they expose themselves to severe punishment. In the present case it is not proved that any injury resulted from the conduct of the pleader but conduct of the this kind must be stopped. The order of Court is that Jugal Chandra Mazumdar be suspended from practice for nine months from this date.

v.S./R.K.

Pleader suspended.

A. I. R. 1916 Patna 393

ATKINSON, J.

Imrit Mahton and others—Appellants.

v.

Bahadur Singh and others—Respondents.

Second Appeal No. 3589 of 1914,
Decided on 18th May 1916.

Bengal Tenancy Act (8 of 1885), S. 103—Presumption of correctness when arises stated—It is not conclusive.

It is not until the Record of Rights is finally published that a presumption of correctness arises. Such presumption however, is not conclusive, but is rebuttable. [P 394 C 2]

Kulwant Sahai and Sivanandan Roy—for Appellants.

G. Dutt Sinha—for Respondents.

Judgment.—This is an action brought by the plaintiffs to recover from the defendants arrears of rent at the rate of Rs. 134-9-6 (dams) payable under a lease, dated 27th May 1900. The lease was executed on behalf of the defendants by defendant 2, who is the son of defendant 1. Defendants 3 to 6 are also sons of defendant 1. The lands demised by the lease cover an area of about 8 bighas 17 cottas and are described as the khudkasht lands of the plaintiffs. The plaintiff contends that he is entitled to recover from the defendants the rent as stipulated by the terms of the lease. Mr. Sahai appearing on behalf of the defendants as appellants developed a very ingenious argument that "khudkasht" lands are the proprietary lands of the zamindar within the provision of S. 116, Ben. Ten. Act, and that by virtue of S. 120 his clients were not bound by the recitals in the lease as to the character of the lands; and that the plaintiff had not given sufficient proof to show that the lands were his private lands and that therefore his clients the defendant-tenants could acquire occupancy rights in these 8½ bighas.

Mr. Sinha for the plaintiff has frankly and candidly admitted that as to the khudkasht lands as described in the lease of 27th May 1900, these defendants as tenants are entitled in point of law to acquire occupancy rights provided they occupy the lands for the qualifying period of 12 years. With that admission by the plaintiff and accepted by Mr. Sahai for the defendants and recorded now in the body of my judgment, it becomes unnecessary for me to further consider the argument that was addressed to me under Ss. 116 and 120, Ben. Ten. Act. I think the admission made by Mr. Sinha is a generous concession to the defendants. Now the only other question that remains for determination is, what rent are the tenants bound to pay for these 8½ bighas of

lands. The rent reserved by the lease is Rs. 134-9-6 (dams); the defendants admit that they have paid Rs. 42-0-9 and no more; that that is the rent which they are bound to pay, and they say furthermore that they do not really hold under this lease at all, because by what they are pleased to call the entry in the Record of Rights they are described as occupancy raiyats at a rent of Rupees 42-0-9. The Record of Rights was never proved in this case nor was it ever produced before the Court for its consideration. The finally published Record of Rights only came into being after the disposal of the appeal. What the defendants did tender in evidence were the drafts of certain entries made in the course of the preparation of the Record to be finally published as the complete and correct Record of Rights. In my opinion it is perfectly clear not only on the section itself but by authority, that these drafts are not evidence and that what alone is evidence is the finally published Record of Rights as required by the Statute.

In the case reported as *Gulab Kuer v. Ram Ratan Pandey* (1) that is laid down to be the law. It is there stated that it is not until the Record of Rights is finally published that a presumption of correctness arises. Therefore, in my opinion, the defendants have not even established the fact of their occupancy rights; nor does any presumption arise from the entry in the Record of Rights that they pay a rent of Rs. 42-0-9. However, assuming that the Record of Rights had been validly proved and that it did record the defendants as occupancy tenants at a rent of Rs. 42-0-9, in my opinion, that would not be conclusive. It is only a presumption as to the correctness of the record in their favour; but it is a presumption that may be rebutted and, in my humble judgment on the findings of fact of this case and on the evidence in support of those findings of fact as proved to the satisfaction of two Courts, it is beyond all doubt that the evidence in this case completely rebuts the presumption that arises from the Record of Rights as now stated.

Every conceivable defence was made against the validity of this lease as being executed by a minor, by a mere stripling, a person without intelligence,

without capacity, without knowledge of what he was doing; but against these arguments both the Courts have found that defendant 2 was a competent contractor, that he was manager on behalf of the joint Hindu family, that he knew that what he was doing and that he did it for the benefit of the entire family. They, the defendants as a whole, took the benefit of the contract made by defendant 2 and have entered into possession and enjoyed the land under the contract. Now they seek to evade their liability upon only a statutory presumption arising under the Bengal Tenancy Act from the Record of Rights. I should be prepared to hold as a matter of law that even if the Record of Rights had been proved and had contained the entries that are now alleged to be in it, the evidence arising from the execution of the contract and the conduct of the parties themselves all conclusively rebut the inference which the defendants seek to draw from the Record of Rights. I feel certain that the finding of the Judge was right that these defendants were not in occupation of the 8½ bighas of land prior to the execution of the lease. For all these reasons it appears to me that the lease of 27th May 1900 is unimpeachable. It is binding on the parties and the defendants are liable to pay, while they remain tenants of these lands, the rent reserved by the lease. I think the rent is a bit too high and I am sorry a compromise cannot be effected, but Mr. Sinha cannot see his way to make a reduction in the rent. He has declined to do so and I must therefore confirm the finding of the Judge as to the amount of the rent. I disallow all interest of any kind and I think that in this particular case having regard to the legal importance of it, it is not a case in which Mr. Sinha ought to accept any costs. No costs will be allowed here.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1916 Patna 395**

ROE, J.

Mt. Parbati Koer—Plaintiff—Appellant.

v.

Jagarnath Prasad and others—Defendants—Respondents.

Second Appeal No. 1456 of 1915, Decided on 17th July 1916.

Pardanashin lady — Decree — Suit to set aside—Burden of proof of concealment of fact is on her—Evidence Act (1 of 1872), S. 102.

Even if a pardanashin lady sues to set aside an ex parte decree on the ground of fraud and concealment of facts the burden lies upon her to show that the decree was obtained by concealment from the Court of material facts in circumstances which indicate that the aggrieved party was prevented by fraud from putting the Court in possession of the true facts.

[P 396 C 1]

Khurshed Hasnain—for Appellant.*Sushil Madhav Mullick and Sailendra Nath Palit*—for Respondents.

Judgment.—In this case the plaintiff was a pardanashin lady. On 16th January 1912 an ex parte decree for rent was obtained against her by Babu Dip Narayan Singh, her landlord. Her lands were put up for sale and were bought in auction by the defendant Jagarnath Prasad. The lady now sues to have the ex parte decree and the sale set aside on the ground that she was kept ignorant of the rent suit, of the execution proceedings and of all subsequent proceedings by her karpardaz Buti Lal Singh, who was in collusion with the defendants, and that all the processes, notice and summons meant for her were surreptitiously served. Upon these allegations issues were framed in the Munsif's Court. Issue 5 is: was the plaintiff ignorant of the Rent Suit No. 1775 of 1911? Issue 6 is: Was the said decree obtained by the defendant Dip Narayan Singh by fraud? These issues were found against the lady by the Munsif. On appeal to the District Court the learned Subordinate Judge recorded that "it is true that the plaintiff-appellant is a pardanashin lady, but I am not satisfied that fraud has been practised on her. It is also true that the rent suit was decreed ex parte yet I am satisfied that the appellant, who was defendant, did enter her appearance. It, therefore, matters little whether the summons in that suit was served by affixing copy or otherwise."

He also goes on to say that he does not believe that there was any collusion between Buti Lal and the plaintiff; and further on he says

"the learned Munsif has very ably dealt with the facts of the case, I see no ground to interfere with his judgment."

Against this judgment an appeal is preferred to this Court and the grounds taken are: (1) that because the plaintiff is a pardanashin lady, the burden of proof was on the defendant to show that all the proceedings taken on

behalf of the plaintiff were taken with her full cognizance; (2) that fuller inquiries should have been made by the lower Court into the manner of serving the summons upon her and if there was any irregularity in serving the summons then it should be held that the orders made in the previous litigation were void. These two contentions are entirely against all the principles of law upon the subject of suits to set aside ex parte decrees. Before an ex parte decree is set aside, it must be shown clearly that that ex parte decree was obtained by concealment from the Court of material facts in circumstances which indicate that the aggrieved party was prevented by fraud from putting the Court in possession of the true facts. The lower Courts have found that the pleader engaged to defend the original suit defended it to the best of his ability; that he was the lady's regular pleader and was satisfied that his instructions came from the lady herself; and that there was no attempt by the decree-holder or by the auction-purchaser to enter into any fraudulent conspiracy with the lady's friends. The suit to set aside the decree was rightly dismissed. The appeal is dismissed with costs in favour of the auction-purchaser. There will also be a hearing fee to respondent 2 of one gold mohur.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1916 Patna 396 (1)

ROE AND JWALA PRASAD, JJ.

Nemdhari Singh and another — Petitioners.

v.

Ram Tahal Rai — Opposite Parties.

Criminal Revn. No. 97 of 1916, Decided on 14th June 1916.

Criminal P. C. (5 of 1898), Ss. 145, 148 and 439 — Proceedings under S. 145 — Award of costs discretionary with Court — High Court has no power to interfere in revision.

A Magistrate should, in awarding costs in proceedings under S. 145, Criminal P. C., hold an inquiry as to the expenditure in costs actually incurred by the party in whose favour the order is made.

The High Court however has no jurisdiction to interfere with an award of costs in such proceedings either under S. 107, Government of India Act, 1915, or under S. 439, Criminal P. C. : 9 C W N 887, *Foll.* [P 396 O 2]

Baidyanath Narayan Sinha — for Petitioners.

Rajendra Prasad — for Opposite Parties.

Judgment.—In this case the applicant was a party to a proceeding under S. 145 and is aggrieved by an order directing that he pay Rs. 160 as costs. A Rule has been issued upon the opposite party to show cause why this order in respect of costs should not be revised. The opposite party has filed an application, in which it is said that they engaged three Mukhtears who appeared on all the dates on which the case was heard and spent considerable sums on their fees and on account of costs of witnesses. They are careful not to disclose what sums were spent. This in our view is an admission that the sum expended by the opposite party was not in fact as much as Rs. 160. S. 148/3 clearly contemplates that a Magistrate shall direct payment only of such costs as have been actually incurred. The proceedings of the Subdivisional Magistrate were defective in that he made no inquiry as to the expenditure in costs actually incurred. Nevertheless, we are not disposed to interfere, for the reason that it being conceded that the proceedings of the Magistrate under S. 145 were not void for want of jurisdiction, the proceedings in regard to costs fall clearly under Chap. 12, Criminal P. C., and are therefore not open to revision, either under S. 107, Government of India Act, 1915 or under S. 439, Criminal P. C. We have no hesitation in accepting the decision on this point in *Rajendra Narain Roy v. Mahomed Arzumand Khan* (1). The application is rejected.

V.S./R.K. *Application rejected.*

1. (1905) 9 O W N 887.

A. I. R. 1916 Patna 396 (2)

MULLICK, J.

Bankey Behary Lal — Defendant — Appellant.

v.

Bhagwandas Marwari — Plaintiff — Respondent.

Second Appeal No. 1307 of 1915, Decided on 16th May 1916.

Limitation Act (9 of 1908), Arts. 132 and 142 — Suit for possession by auction-purchaser in mortgage decree alleging dispossession — Suit dismissed under Art. 142 as no possession was proved — Held in appeal he can urge that Art. 132 applies and cause of action accrued from confirmation of possession — Held also bar of inconsistent plea does not apply — Held also point of limitation can be urged at any stage — Held also where

decree-holder is auction-purchaser question of fraudulent decree can be enquired into.

When a suit for possession by a purchaser at a sale in execution of a mortgage-decree, based on the allegation that soon after obtaining possession he was dispossessed by the judgment-debtor, is dismissed on the finding that he was never in possession within 12 years of suit and that his claim was barred under Art. 142, Lim. Act, it is open to the plaintiff to urge in appeal that his suit was within time, computing it from the date of confirmation of sale under Art. 138.

[P 397 C 2]

The principle of estoppel by reason of inconsistent position does not apply to such a case. The plaintiff is entitled to apply the law to the facts established at the trial, even though he failed to prove what he came to prove.

[P 397 C 2]

The point of limitation can be taken at any stage.

The judgment-debtor can resist such a suit on the ground that the decree, in execution of which the plaintiff became the purchaser, was fraudulent, where the decree-holder himself purchased the property, and the Court is bound to go into that question.

[P 397 C 2]

Dwarka Nath Mitter and Debendra Nath Mandal—for Appellant.

Judgment.—The plaintiff's case is that on 15th February 1900, he sold 11-gandas pukhta share of mauza Ram-pur in execution of his mortgage-decree, purchased it himself, obtained possession in 1901, and was dispossessed six months later by the defendant mortgagor. He brought the present suit on 13th March 1912, for declaration of title and recovery of possession. The Munsif found, firstly, that the mortgage decree was fraudulent and, secondly, that, as the plaintiff never obtained possession and was never dispossessed, the suit was barred by limitation. He accordingly dismissed the suit. On appeal by the plaintiff the learned District Judge has found that Art. 138, Sch. 1, Lim. Act, applies and that the suit was in time having been brought within 12 years from the date of the confirmation of the sale, namely, 21st March 1900. He has also found that it was not open to the defendant in this suit to invite the Court to go into the allegation that the plaintiff had obtained a fraudulent mortgage-decree by causing the Court to give him a decree for 11-gandas pakka share when the mortgage deed conveyed only an 11-gandas kutcha share. The learned District Judge decreed the suit and ordered delivery of possession to the plaintiff: hence this second appeal by the defendant.

The plaintiff bases his suit under

Art. 142, Lim. Act, and the Munsif finds that as he never was in possession within 12 years of the suit his claim is barred. But the learned Munsif has also found that the plaintiff never obtained delivery of possession, and the learned District Judge, accepting that finding, has correctly applied Art. 138. It is urged by the learned vakil for the appellant that the plaintiff cannot be allowed to make a new case in the appellate Court when in his plaint he asserted that he was dispossessed after obtaining possession. In my opinion the principle of estoppel by reason of inconsistent positions does not apply here. The plaintiff is entitled to apply the law to the facts established at the trial, even though he failed to prove what he came to prove. The point of limitation can be taken at any stage and I agree with the learned District Judge that the suit was within time. It is true that S. 66, Civil P. C., vests title with the auction-purchaser from the date of sale, but that does not relieve him from the duty of obtaining delivery of possession if he wishes to take the benefit of Art. 142 or 144. But the learned District Judge is clearly wrong in refusing to go into the questions of fraud and maintainability of the suit. He must decide all the remaining issues necessary for the disposal of the case. His decree will be set aside and the case remanded for disposal in accordance with the observations herein made. Costs will abide the result.

V.S./R.K.

Appeal allowed.

A. I. R. 1916 Patna 397

ROE AND JWALA PRASAD, JJ.

Jamuna Prasad—Appellant.

v.

Magai Ram—Respondent.

Civil Misc. Appeal No. 586 of 1915, Decided on 1st May 1916.

Civil P. C. (5 of 1908), O. 21, R. 69 and O. 41, R. 5—Ex parte decree—Application to set aside—Dismissal—Appeal—Appellate Court not empowered to stay execution proceedings—Original Court has discretion.

During the pendency of an appeal against an order refusing to set aside an ex parte decree, the original Court has discretion to stay proceedings in execution pending the disposal of the appeal. There is no such power vested in the appellate Court: 31 Cal 1081, Ref.

[P 398 C 1]

Abani Bhusan Mukherji—for Appellant.

Ram Prasad—for Respondent.

Judgment. — This rule was obtained upon the opposite party, a decree-holder upon a mortgage suit, to show cause why execution proceedings in the suit should not be stayed pending an appeal in this Court. The facts briefly are that the applicant had filed an application to set aside an ex parte decree upon a mortgage, that application was rejected by the Subordinate Judge, and an appeal is now pending against that rejection. The judgment-debtor applied to have the sale postponed until the appeal against the order rejecting the application for re-hearing had been taken up and disposed of, and that application was rejected by the Subordinate Judge. The proceedings have so far been misconceived. The case reported as *Bhagwat Rajkoer v. Sheo Golam Sahu* (1) is sufficient authority for the proposition that there is no power vested in an appellate Court to stay proceedings in a case such as this. But the papers being before us, under S. 115 we deem it expedient to modify the orders made by the learned Subordinate Judge upon the application to postpone the sale. The learned Subordinate Judge writes:

"Execution proceedings cannot be stayed unless there is a distinct order from the appellate Court to that effect."

That is to a great extent, correct, but the learned Subordinate Judge failed to exercise the discretion vested in him under O. 21, R. 69, which gives him power to postpone the sale to any specified date. Such an order should have been made in this case. We propose to advise the learned Subordinate Judge to make it now. We return the case to him, the order already made dated 28th February 1916 being vacated, and we direct him to re-hear the application to postpone the sale, and recommend that the sale be postponed to 15th June on condition that the judgment-debtor waives fresh service of attachment and proclamation. In the meantime instructions will be issued to the Registrar to expedite this appeal and do everything possible to bring it on for hearing before the 1st day of June. The costs of this Rule will form part of the costs of the case, hearing fee two gold mohurs.

V.S./R.K.

Case returned.

1. (1904) 31 Cal 1081.

A. I. R. 1916 Patna 398

ROE, J.

Rameshwar Singh Bahadur—Plaintiff
—Appellant.

v.

Bikan Mamin and others—Defendants
—Respondents.

Second Appeal No. 2901 of 1914,
Decided on 17th July 1916, from decree
of Dist. Judge, Darbhanga, D/- 6th July
1914.

**Bengal Tenancy Act (8 of 1885), Ch. 13 —
Suit for katiari dues is suit for money and
not agricultural rent.**

A suit to recover katiari dues, being a profession tax, is a suit for money and cognizable by a Small Cause Court, and is not to be confounded with a suit for agricultural rent under the Bengal Tenancy Act. [P 399 C 1].

Purnendu N. Sinha and Murari Prasad—for Appellant.

Ray Guru Saran Prasad — for Respondents.

Judgment.—This appeal arises out of a suit, in which the plaintiff as landlord claimed rent for a small agricultural holding held by one of the weaver castes and also for a profession tax or house rent from the said weaver for the carrying on of his trade in his house and on the waste land adjoining his house. The Courts below have concurred in holding that the right of the plaintiff to realise this tax has not been proved; their point of view being that there is no contract or custom proved upon which the defendants can be held liable. The lower appellate Court has also held that the suit must fail for the reason that a claim to katiari, whether it be called a house rent or a profession tax, is clearly a suit for money, not to be joined with a suit which under the Bengal Tenancy Act must be tried under Ch. 13 of that Act, and not under the Civil Procedure Code.

The suits were decreed in respect of the rent for the agricultural holding and dismissed in respect of the claim for katiari. Against this part of the decree the plaintiff appealed and his appeal was admitted in the High Court only upon an undertaking given by the Vakil at the time of the hearing under O. 41 that, if admitted, the suit would be withdrawn with permission to bring a fresh suit. I see no reason for binding the learned Vakil to this undertaking. It is obvious to me and admitted by the learned *Rai Bahadur* on behalf of the

plaintiff that the suit, being for a profession tax, obviously a suit for money and obviously cognizable by the Small Cause Court and is not to be confounded with a suit for agricultural rent. The suit was in fact dismissed upon this preliminary ground and the question whether the defendants are liable by a custom or by a contract for the katiari claimed, has not been adjudicated upon within the sense attached to S. 11, Civil P. C. I therefore dismiss the appeal with costs, with the remark that the suit has been dismissed on the preliminary ground that there has been no adjudication upon the rights of the parties which can hereafter be claimed by the defendants to be res judicata.

V.S./R.K. *Appeal dismissed.*

A. 1. R. 1916 Patna 399

ATKINSON, J.

Nag Narain—Defendant—Appellant
v.

Jung Bahadur Sahai and others — Plaintiffs—Respondents.

Second Appeal No. 45 of 1914, Decided on 17th May 1916, from decision of Dist. Judge, Saran, D/- 3rd May 1913.

Bengal Tenancy Act (8 of 1885), S. 65—Tenant right sold in execution of rent decree of latter period—Nothing is left for being sold in a latter execution of rent decree of earlier period.

The plaintiff and his co-sharers leased their proprietary right in a holding to the Cawnpore Factory. The latter brought a suit to recover arrears of rent due from the tenant after the lease and obtained a decree. In execution of the decree they purchased the holding. Subsequently plaintiff brought a suit to recover arrears of rent due to him and the other co-sharers prior to the lease and he obtained a decree in execution whereof he purchased the same holding :

Held : that the interest of the tenant having been extinguished and eliminated in the course of the execution of the decree obtained by the Cawnpore Factory, there was no subject-matter in existence on which the plaintiff's decree could operate to effectually vest in the plaintiff any interest whatsoever. [P 400 C 1]

Muhammad Mustafa Khan—for Appellant.

Nirsu Narain Singh and Harnarain Prasad—for Respondents.

Judgment.—The facts of this case are very peculiar and require to be stated with some little care. The action was brought by Lala Jung Bahadur Sahai for declaration of title and for confirmation of possession of a certain holding which formerly was occupied by a tenant of his and other co-sharers in

this property. It appears that the plaintiff and his other three co-sharers leased their proprietary right in this holding to a corporate body called the Cawnpore Factory, and as lessees they became entitled to claim the rent from the occupying raiyat, and in pursuance of the title which they acquired they proceeded in default of payment of the rent to recover from the raiyat in a rent suit a decree for the arrears due : and they obtained a decree for the amount of the rent claimed. The holding is a non-transferable holding, and of that there is no dispute upon either side. Accordingly in the rent suit instituted by the Cawnpore Factory against the tenant the Cawnpore Factory in the process of execution purchased all the estate and interest of the tenant in that holding.

The rent that was sued for was the rent that accrued due after the date of the lease. It appears that the Cawnpore Factory, in pursuance of the purchase which they made in the execution proceedings in the rent suit, obtained on 3rd October 1909 possession of the holding, and neither the plaintiff nor his other co-sharers, although aware of this sale and purchase, offered any objection ; and they appear to have acquiesced in the arrangement. The plaintiff as one co-sharer subsequently brought an action against the tenant of the same holding to recover an arrear of rent due to him and his other co-sharers in respect of rent due prior to the granting of the lease to the Cawnpore Factory and he obtained a decree in respect of his share and interest in the rent of this holding ; and in the course of that proceeding he is alleged to have become on 24th January 1910 the purchaser of the tenant's interest in the holding, which was antecedently sold in pursuance of the decree obtained by the Cawnpore Factory, and the plaintiff claims on 20th August 1910 to have got possession of the holding under his purchase in execution of the rent-decree obtained by him.

In the view I take of this case, I may be right or I may be wrong, the Cawnpore Factory purchased all the estate and interest of the tenant in the holding on 20th July 1908. I fail to see what interest there was in that tenant's holding upon which the decree obtained by

the plaintiff in this action in January 1908 could in any way operate whatsoever. The interest of the tenant had been extinguished and eliminated in the course of the execution and there was no subject-matter in existence on which the decree could operate to effectually vest in the plaintiff any interest whatsoever. The Cawnpore Factory no doubt on 22nd October 1910 contracted and agreed to sell and conveyed and gave delivery of possession to the present appellant, the defendant in this suit, of the holding which they had purchased. Therefore having regard to the view I take of this case, the plaintiff acquired no interest whatsoever in the holding which he is alleged to have purchased. And it appears to me that S. 65, Ben. Ten. Act, does not afford the plaintiff the right to pursue his remedy by way of sale of the holding for arrears of rent due prior to the lease to the Cawnpore Factory, when the property has passed to a purchaser in pursuance of the execution of the decree obtained by the Cawnpore Company.

Consequently, his action for title cannot be maintained and it follows that this action must fail. No doubt if the landlords or the co-sharers had taken proper steps as provided by the Bengal Tenancy Act they might have safeguarded their interest. They have thought fit to embark upon a proceeding which, in my opinion, has made all their efforts entirely abortive. I regret that I must state that I received no assistance during the course of the argument from the vakil on behalf of the plaintiff. Not being myself very familiar with the decisions in India on this land Code, I arrived at the conclusion I did upon what appeared to me to be legal principle mingled with a little common sense. I shall therefore allow this appeal and dismiss the action with costs in all Courts.

V.S./R.K.

*Appeal allowed.***A. I. R. 1916 Patna 400**

MULLICK, J.

Ram Tahal Singh and others—Plaintiffs—Appellants.

v.

Sukeswar Reyain — Defendant—Respondent.

Second Appeal No. 4148 of 1913, Decided on 10th April 1916.

Civil P. C. (5 of 1908), O. 41, Rr. 4 and 33—Appeal by one co-defendant—Decree based on grounds common to all defendants—Appellate Court has power to interfere and pass decree in favour of all defendants—Rr. 4 and 33 meant to prevent contradictory decisions.

Order 41, R. 33, read with O. 41, R. 4, Civil P. C., gives the appellate Court power to interfere with a decree if the decree is based upon grounds common to all the defendants although only one of such defendants has appealed against that decree. There is no justification for the proposition that a defendant who suffers a decree to be passed ex parte against him cannot benefit by the appeal of his contesting co-defendant. The object of Rr. 4 and 33, O. 41, is to prevent contradictory decisions in the matter of the same suit.

Bankim Chandra Mukerji — for Appellants.

Laxmi Narain Singh — for Respondent.

Judgment. — The case of the plaintiffs is that two ladies, Mt. Sukeswar and Mt. Gangajal, executed in his favour, for a consideration of Rs. 300, a patta in perpetuity for 4 bighas of land. Defendant 2, Mt. Gangajal, did not appear, but Mt. Sukeswar contested the suit stating that she never executed the patta: that her intention was to execute a mortgage-bond and that the plaintiffs had manufactured the patta in suit in collusion with defendant 2, and fraudulently induced her to admit execution at the registry office; that the consideration money had never been paid and that the plaintiffs were not entitled to a declaration of their mukarrari right and khas possession. The Munsif decreed the suit and defendant 1 appealed. No appeal was preferred by defendant 2. The result of the appeal of defendant 1 was that the Subordinate Judge held that no consideration money had passed; that defendant 1 had never executed the patta and that registration had been obtained by fraud on the part of the plaintiffs. He also held that neither defendant 1 nor defendant 2, who were pardanashin Hindu ladies, had obtained independent advice in relation to the transaction. The Subordinate Judge therefore dismissed the whole suit.

The only point taken in the present second appeal by the plaintiffs before me is that, inasmuch as defendant 2 did not appeal against the decree of the Munsif and was apparently satisfied with the decree, it was not competent to the Subordinate Judge to dismiss the whole

suit. Now, O. 41, R. 33, read with O. 41, R. 4, would seem to give the Court power to interfere with a decree if that decree was based upon grounds common to all the defendants, although only one of such defendants had appealed against that decree. It is a question in each case to be judged upon the circumstances whether the decree appealed against has proceeded on a ground common to all. In the present case the Court's decree is based upon the finding that there was no execution either by Sukeswar or Gangajal; that there was no independent advice to either in the matter of the transaction and that registration was obtained by the fraud of the plaintiffs against both, and that no consideration money passed. There are grounds which would have been common both to defendants 1 and 2, if defendant 2 had chosen to put in an appearance; and I have to see whether her absence in the Court of the Munsif makes any difference. In my opinion, it does not. If the Court's decree is based upon a common ground which she might have taken, it is sufficient to give her the benefit of the decree passed in favour of her co-defendant. The case of *Sreenath Chowdhry v. John James Grey* (1) is authority in support of this proposition. In that case the decree was passed ex parte against certain defendants, but on appeal by one of the contesting defendants the whole decree was set aside on the ground that the decree had proceeded on a ground common to all. There is no justification therefore for the proposition that a defendant who suffers a decree to be passed ex parte against him cannot benefit by the appeal of his contesting co-defendant. It is true that the case above cited was under a former Civil Procedure Code, but the provisions of the section, namely, S. 119, Act 8 of 1859, do not materially differ from the provisions of our corresponding rule, viz., O. 41, R. 4, of the present Code. I think therefore that I am bound by the authority of the Weekly Reporter case. On general principles also the learned Subordinate Judge's decision would seem to be right. The object of Rr. 4 and 33, O. 41 is to prevent contradictory decisions in the matter of the same suit, and in the present case it would be somewhat absurd if we were to hold that the patta

1. (1870) 13 W R 114.

was as against defendant 1 a fraudulent transaction but as against defendant 2 perfectly genuine and valid. The result is that the appeal fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 401

MULLICK, J.

Gopal Ram Marwari — Defendant—Appellant.

v.

Narsing Prasad Misser—Plaintiff—Respondent.

Second Appeal No. 1063 of 1915, Decided on 7th August 1916, against decree of Addl. Sub-Judge, Bhagalpur, D/- 5th February 1915.

Mortgage—Owner of equity of redemption dispossessed in execution of mortgage decree though not against him—He need not sue for redemption and can recover possession.

An owner of an equity of redemption, who has not been joined as a defendant in the suit upon the mortgage and who has been wrongfully dispossessed by the mortgage-decree-holder in execution of his decree, can sue for khas possession and mesne profits and is not bound to sue for redemption: 7 CWN 11, *Ref* [P 402 C 2, P 403 C 1]

P. R. Das and Naresh Chunder Sinha —for Appellant.

Kulwant Sahay and Surendera Mohan Das—for Respondent.

Judgment. — This appeal arises out of a suit for mesne profits relating to a property called Lodipur in which one Mt. Dhirajwati Chowdhraïn exercised the rights of a Hindu widow upon the death of her husband Sheolal Rai Chowdhuri. One Himmut and his nephew Gajadhar, who is plaintiff 2 in the present suit, obtained a money-decree against Dhirajwati and in execution purchased her interest in the property. Execution, however, was taken out only by Himmut and the sale certificate stands in his name alone. It is found as a fact that at that time Gajadhar was a minor. This took place in 1903. In 1909 Gopal Ram, defendant in the present suit, brought the property to sale in execution of his mortgage decree, making in that suit the lady and Himmut defendants. He bought the property himself at the sale and obtained possession. There were land registration proceedings in 1907 in which Gajadhar was recorded as in possession of his eight-annas share. In 1912 Dhirajwati died. The present suit was brought on 19th September 1913 by Gajadhar

for a declaration that between the year 1909 and 1912 he had a title to the property and as the defendant was unlawfully in possession during that time he is entitled to recover mesne profits for that period.

Plaintiff 1, Narsingh Prasad, comes into the case because it is alleged that Gajadhar has transferred his right to recover mesne profits to him. The Munsif dismissed the suit. In appeal the Subordinate Judge has found that Gajadhar had title during the years in question and that he was entitled to mesne profits. He has, however, reduced the claim from Rs. 600 to Rs. 389-9-0. The first point urged by Mr. Dass on behalf of the defendant-appellant is that the suit was not maintainable under S. 66, Civil P. C. It is contended that, as the defendant was a purchaser in execution of a decree against Himmut, he was the representative of Himmut for all purposes, and that any estoppel of which Himmut could have claimed the benefit can also be claimed by him. Therefore, it is urged that as a suit by Gajadhar against Himmut would not lie under S. 66, Civil P. C., a suit also would not lie against the defendant. Now this would be a perfectly valid contention if it could be established that the defendant is in fact the representative of Himmut. But in order to ascertain whether this is so, it is necessary to examine what was the decree which the defendant obtained against Himmut.

Now we do not even know whether the mortgage was by Dhirajwati herself or whether it was by her husband. If Dhirajwati was in the mortgage suit only brought upon the record as a Hindu widow representing the estate, and a decree was obtained against her on that footing and Himmut was brought upon the record only as having some interest in the property by virtue of his purchase in a money-decree against Dhirajwati's life-interest, how can we say that the defendant, by his auction-purchase, stepped into the shoes of Himmut? It is impossible, without a full investigation of the facts, to say whether the defendant was or was not the complete representative of Himmut. This point was not litigated in the Courts below and the ingenious argument presented by Mr. Dass cannot prevail.

Upon the facts, as they stand, it has not been shown that the defendant is the representative of Himmut. Therefore the defendant cannot take the benefit of S. 66, Civil P. C.

The next point taken is that the lower appellate Court has wrongly thrown the burden of proof upon the defendant. This is not the case, because it appears that the Record of Rights was published in 1907 and that it shows that Gajadhar was entitled to a half share. The entry in the Record of Rights throws the onus upon the defendant. The third point is that Gajadhar held himself out to the world that Himmut was the real owner of the property by allowing Himmut to purchase it in his own name alone. Now the reply to that is first that Gajadhar was a minor at the time and, therefore, there could be no holding out on his part in law, and the second is that the purchase could not have been made bona fide by the defendant; for the Record of Rights having been published a year before his suit, he must be presumed to have had notice that Gajadhar had an interest in the property, and, therefore, it was his duty to join Gajadhar as a defendant. Not having joined him as a defendant, it is not for him to say that his purchase was made bona fide and without notice so as to come within the operation of S. 41, T. P. Act. In any event the question whether or not the purchase was bona fide is a question of fact which ought to have been litigated in the Courts below. This point having been taken for the first time in second appeal, it does not appear that any opportunity was given to either of the Courts below for finding whether or not the case comes within the rule in S. 41.

The fourth point is that in any event even if Gajadhar had an eight-annas share in the property and was wrongly excluded from the category of defendants in the mortgage suit, his only remedy is to sue for redemption, and that it is not competent in the present suit for him to sue for khas possession and for mesne profits. The reply to this is that there is no authority which goes so far as to lay down that the owner of the equity of redemption, who has been wrongfully dispossessed by a mortgage-purchaser in execution of his decree, can only bring a suit for redemption. It

may be that he does not wish to redeem and that he wishes to obtain khas possession of the property. In that case there is no authority which debars him from suing for khas possession and declining to take the other redemption. The case of *Bunwari Jha v. Ramjee Thakur* (1) is no authority for the proposition that as against a mortgagee-purchaser a person entitled to the equity of redemption who has not been joined in a suit cannot sue the purchaser for khas possession. In my opinion a suit by Gajadhar, during the lifetime of the widow, would have been perfectly competent if it had been framed for a declaration of title and recovery of possession. Therefore, he would have been entitled to mesne profits. The widow being dead it is no longer competent for him to recover possession, but it is competent for him to recover mesne profits on the footing that he would have been entitled to khas possession during the years 1909 to 1912. It is clear that, so far as plaintiff 1 is concerned, he has no locus standi, because his right to recover mesne profits being a mere actionable claim is not transferable, but that cannot defeat the suit because Gajadhar is entitled to a decree in his own right.

On behalf of the respondent it is urged that the appeal does not lie, because the subject-matter being below Rs. 500, and the suit being in the nature of a Small Cause Court suit, S. 102, Civil P. C., bars a second appeal. I think the reply to this is that this is really not a suit for mesne profits pure and simple; it is a suit for a declaration of title where such declaration of title is not merely incidental or ancillary—it goes to the root of the case and, therefore, the suit is substantially one for declaration of title. A second appeal, therefore, lies, but upon the merits I find against the appellant and dismiss the appeal with costs.

V.S./R.K.

Appeal dismissed.

1. (1903) 7 C W N 11.

A. I. R. 1916 Patna 403

CHAMIER, C. J. AND JWALA PRASAD, J.
Kharagnath Misra and others—Plaintiffs—Appellants.

v.

Nakcheddi Jha—Defendant—Respondent.

Second Appeal No. 386 of 1915, Decided on 21st July 1916, from decision of Dist. Judge, Darbhanga, D/- 6th May 1915.

(a) Civil P. C. (5 of 1908), Sch. 2, Para. 16—Decree in accordance with award not appealable.

No appeal lies from a decree passed in accordance with an award of arbitrators, except in so far as the decree is in excess of or not in accordance with the award. [P 403 C 2]

(b) Civil P. C. (5 of 1908), Sch. 2, Para. 16—Award—Objections to—Discretion of Court to grant or refuse time for producing evidence—High Court—Revision.

It is discretionary with a Court to grant or refuse time for producing evidence in support of objections to an award, and where it has acted with due care and attention the High Court will not interfere in revision: 33 I C 30, *Diss from*. [P 404 C 1]

Baldeo Narain Singh—for Appellants.
Harnarayan Prasad—for Respondent.

Chamier, C. J.—We have before us a second appeal against a judgment and decree of the District Judge of Darbhanga reversing a decree of the Munsif of Madhubani and also an application for revision of the decree of the District Judge. The decree of the Munsif followed upon a judgment pronounced in accordance with an award made by arbitrators. Sch. 2, para. 16, Civil P. C., provides that no appeal shall lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. Therefore, it is clear that no appeal lay to the District Judge against the decree passed by the Munsif. There has been some difference of opinion as to whether under such circumstances a second appeal lies to the High Court or the proper remedy is by way of application for revision. As we have before us both an appeal and an application for revision, we need not stop to consider this question. It is clear that the decree of the District Judge must be set aside. But we are asked to consider whether in the exercise of our revisional jurisdiction we ought not to set aside the decree passed by the Munsif, on the ground that he acted with material irregularity in the exercise of his jurisdiction. It appears that at the request

of all parties to the suit the matters in dispute were referred to the arbitration of certain pleaders practising in the Munsif's Court. On 23rd November 1914, the arbitrators made their award and filed it in Court. Thereupon the Munsif directed that it should be put up on 4th December and that in the meantime notice should be given to the parties. Notice was given to the parties and the case came up on 4th December. In the meantime on 2nd December the present appellants and applicants had filed objections to the award. When the case came on for hearing on 4th December they applied for further time. The Munsif rejected their application observing that their objections were frivolous.

He then proceeded to pass a decree in terms of the award. It is contended that the Munsif ought to have allowed the applicants further time in order that they might produce evidence. The objections are of such a nature that probably no evidence could have been available in support of them. For the most part they are on the face of them frivolous. But apart from that it appears to me that the Munsif had to consider whether in all the circumstances further time should be allowed. In the exercise of his discretion he decided that further time should not be allowed. The applicants rely upon a decision in the case of *Durga Baksh Singh v. Fateh Bahadur Singh* (1), where Walsh, J., interfered in revision with an order passed by a Subordinate Judge in circumstances not unlike those of the present case. I observe that Piggott, J., the other member of the Bench, which disposed of the case, said that he did not formally dissent from the order proposed by his colleague as the matter had already occupied a disproportionate amount of the time of the Court. But he made it quite clear that if he had been sitting alone he would have rejected the application. In my opinion, he would have been right in doing so. In my opinion, we have no jurisdiction to interfere with the order of the Munsif. There is nothing whatever to suggest that he acted without due consideration of the circumstances of the case. He had a discretion to exercise and I assume that he exercised it with due care and attention. I

would set aside the decree of the District Judge and restore the decree passed by the Munsif. The respondent will pay the applicant's costs of the application for revision and also the applicant's costs in the Court of the District Judge. There will be no order as to costs of the second appeal. Hearing fee in the application for revision one gold mohur.

Jwala Prasad, J.—I agree.

V.S./R.K.

Appeal accepted.

A. I. R. 1916 Patna 404

ATKINSON AND KINGSFORD, JJ.

Sukhdeo Prasad — Defendant—Appellant.

v.

Gopal Misra and others—Plaintiffs and Defendants—Respondents.

First Appeal No 800 of 1915, Decided on 11th August 1916, from decision of Dist. Judge, Patna, D/- 26th February 1915.

Civil P. C. (5 of 1908), O. 1, R. 8—Dedication to temple by members of community—Pujari setting up adverse title—members can sue for declaration of their right—Proper form of decree in such suit pointed out—Specific Relief Act (1 of 1877), S. 42—Further held removal of pujari cannot be claimed—Civil P. C. (5 of 1908), S. 92.

Where land is dedicated to a temple by members of a community and conveyed to a person whom they appoint the pujari of the temple for management, the members of the community have under O. 1, R. 8, Civil P. C., a right to maintain an action against the pujari or his heir who attempts to set up his own title thereto for a declaration that the property belongs to them: 21 *Mad* 10 and 4 *Cal* 33, *Ref.*

[P 405 C 1]

The proper form of the decree will be to declare that the property is a public, religious and charitable trust, that the defendant has no right or title thereto and that he is a mere trespasser, and to restrain defendant from interference with the property.

[P 405 C 2]

No claim for the removal of the pujari from office can be set up in such a suit. [P 405 C 2]

Ganesh Dutt Singh—for Appellant.

Kulwant Sahai Chandra Sekhar Prasad and T. N. Sahai—for Respondents.

Atkinson, J.—The case has been very carefully argued before us, and we have arrived at a clear conclusion as to the form our order shall take. It appears that in the year 1877 a section of the Hindu community subscribed money by way of public subscription, for the purpose of purchasing a plot of land for the erection of a temple thereon. The property was purchased and was dedicated to the religious purpose of the

worship of Shiva, and the land as purchased was conveyed to Ramcharan Das as nominee on behalf of the community, and he was appointed pujari of this temple. It is clear that he was nominated as the vendee of the property in trust, because he was believed to be an upright and honest man whom the public might have trust and confidence in; and accordingly during his life no difficulty arose. He died in March 1910. Defendant 1 then created the present difficulty which gives rise to this action. The defendant claims that he is the heir of Babu Ramcharan Das, and that this property, namely, the temple and its site, constituted the property of Ramcharan Das, and that he now is entitled to succeed thereto and claim it as his own absolute property.

On the other hand the plaintiffs claim that this temple and its site was purchased with public money subscribed by members of the Hindu community and is a religious charitable trust; and they sue on behalf of themselves and the other members of the community to maintain the rights of the community to this temple. The defendant claims possession and has attempted to assert his right to the ownership of this temple and has attempted to erect structures thereon. It is against these acts that the plaintiffs seek relief in this suit. The plaintiffs applied to the Court under O. 1, R. 8, to be appointed to represent the class of the community which would vest them with authority to bring this action. This they could do on the authority of the cases cited: in *Ganapati Ayyan v. Savithri Ammal* (1) and *Abhassi Beyum v. Maharanee Raj-roop Koonwar* (2). Such leave was given by the Court, and thereupon in pursuance of the direction contained in O. 1, R. 8, the plaintiffs publicly gave notice to the world of the fact that they had been appointed as members of the class to represent the entire class. Thus, we think they are clothed with sufficient authority, not as trustees, but as members of the body whom they represent, to maintain this action not in the form in which the action is pleaded but in the form in which we think they are entitled to a declaration of right.

This case was tried by the Munsif,

1. (1898) 21 Mad 10.

2. (1879) 4 Cal 33.

and he arrived at the conclusion that the plaintiffs had established their right to possession of this property. He made a declaration in that form and granted an injunction against defendant 1 restraining him from dealing with or interfering with the temple. The matter came on appeal before Roe, J., and he by his order or decree simply affirmed the order of the Munsif. But in his judgment he categorically deals with each issue that was framed in the suit, and gives an affirmative finding in respect of each issue. By issue 2 he holds that the defendant is a trespasser, and in that view we entirely concur. He also finds that the plaintiffs are not entitled in this form of action to eject the defendant from his office as priest; but as representing a body of the Hindu community, they are entitled to a declaration that the property is the property of the community and not the private property of the defendant. We partially concur in that view, but we think that the declaration ought to be more specific that the plaintiffs are entitled to a declaration that this property is a public, religious and charitable trust, and that the defendant has no right or title thereto whatsoever, and that in asserting his claims to the property he is acting mala fide, and, in our opinion, as a trespasser. Having said no much we think that it is our duty also to say that the plaintiffs now ought to take proceedings under S. 92, Civil P. C., and have a properly constituted committee or trustee appointed to represent the trust property and the interests of all those concerned in the trust.

When the order was made that was made under O. 1, R. 8. The matter was appealed from; and on appeal the matter was decided in favour of the plaintiffs. Against that order objection cannot now be urged under S. 105, Civil P. C. We are satisfied that the plaintiffs are entitled to get a limited form of declaration in the terms which I have stated and that they are entitled, consequential upon that declaration, to be protected from intrusion and interference and molestation by defendant 1. Accordingly we shall grant an injunction against the defendant pronouncing that he has no right to the property, and enjoining him, not to interfere molest or harass the plaintiffs and others in the enjoyment

of their property and interests. We shall therefore dismiss this appeal with costs. I just desire to add one observation as to issue 2. In our view no question can arise in this suit on that issue. We think Roe, J., was right in the conclusion at which he arrived in respect of that issue.

Kingsford, J.—I agree that the appeal should be dismissed.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 406 (1)

MULLICK, J.

Banwari Lal and another—Defendants—Appellants.

v.

Jagar Nath Pershad—Plaintiff—Respondent.

Second Appeal No. 3024 of 1914, Decided on 6th April 1916, from decision of Dist. Judge, Patna, D/- 5th August 1914.

Negotiable Instruments Act (26 of 1881), S. 80—Hundi—Rate of interest not mentioned—Oral evidence to pay contemporaneous agreement to pay interest inadmissible—Evidence Act (1 of 1872), S. 92.

In a suit upon a hundi, in which no rate of interest is mentioned, the plaintiff is entitled to interest at the rate of 6 per cent. per annum under S. 80, Negotiable Instruments Act. No evidence is admissible under S. 92, Evidence Act, to prove an oral contemporaneous agreement as to the rate of interest. [P 406 C 1]

Ganesh Dutt Singh and Sivanandan Ray—for Appellants.

Kulwant Sahai—for Respondent.

Judgment.—Defendant 2 is the drawer, defendant 1 is the acceptor and the plaintiff is the payee. The hundi mentions nothing about interest but the lower appellate Court has decreed the rate of 12 per cent. per annum on the footing of an oral contemporaneous contract. The present second appeal is preferred by the two defendants on the ground that the plaintiff is not entitled to more than 6 per cent. interest under the provisions of S. 80, Negotiable Instruments Act. There can be no doubt, and it is in fact conceded, that the hundi is a negotiable instrument in this case. Therefore, unless there is a special rate of interest contracted for by some other contract contemporaneous with the hundi, S. 80 must apply. There is no such other contract in writing nor is oral evidence in support of any such contract admissible under S. 92, Evidence Act. The case of *Luchmi Chand*

Jhowar v. Hemendra Prasad Ghosh (1) is authority for this. Therefore S. 80 must apply and the plaintiff is entitled only to 6 per cent. interest. It was sought somewhat faintly to argue that if more than 6 per cent. interest was not allowable, the plaintiff was at least entitled to 12 per cent. as damages, but the plaintiff does not show that any case for damages was made in the Courts below. The appeal will, therefore, succeed and the decree of the lower appellate Court will be modified to the extent that interest will be calculated not at 12 per cent. but at 6 per cent. No order will be made as to costs.

V.S./R.K.

Decree modified.

1. A I R 1915 Cal 37 and 321=26 I C 925.

A. I. R. 1916 Patna 406 (2)

SHARFUDDIN AND ROE, JJ.

Harihar Charan—Defendant—Appellant.

v.

Jang Bahadur—Plaintiff—Respondent.

Second Appeal No. 1625 of 1914, Decided on 28th April 1916, from the decision of Dist. Judge, Patna.

(a) Hindu Law—Succession—Mitakshara—Grandfather's daughter's son's son is heir.

A grandfather's daughter's son's son is a legal heir under the Mitakshara School of Hindu Law; 22 Cal 339 and A I R 1915 P C 70 (P C), Ref. [P 407 C 1]

(b) Hindu Law — Succession — Bandhu—(Per Roe, J.) In Mitakshara not only consanguinity but right to offer oblations must be considered.

Per Roe, J.—Although the position of a bandhu in Mitakshara law is based on consanguinity, it must still be supported by the right to offer oblations to a common ancestor. [P 407 C 1]

Kulwant Sahai—for Appellant.

L. N. Sinha and Ram Prasad—for Respondent.

Sharfuddin, J.—The only point for decision in this appeal is as to whether Jung Bahadur, the plaintiff, is the legal heir of one Sham Narain. The contesting defendants are purchasers from Gouri Sundar Kuar, the widow of Sham Narain. After the death of Sham Narain Gouri Sundar Kuar took possession of the estate left by her husband, and she, during her lifetime, alienated certain properties of the estate of her husband to the contesting defendants. The plaintiff brought the suit for the purpose of a declaration that he is the legal heir of Sham Narain. Jung Bahadur, the plaintiff, is Sham Narain's grandfather's grandson's son.

Todur Mull is the original ancestor; he had a son and a daughter, namely, Udit Narain and Sulochan Kuar. Udit Narain's son was Sham Narain; Sulochan had a son Kali Sahai, whose son is Jung Bahadur, the plaintiff. It has been conceded that if Jung Bahadur is removed in the 5th decree from Sham Narain he will be a legal heir, and will succeed to the estate left by Sham Narain. It was contended that, counting from Sham Narain, Jung Bahadur stands in the 6th decree. Udit Narain and Sulochan Kuar are related to each other in the first decree. Sham Narain is related to Sulochan in the third decree, and to Kali Sahai in the 4th and to Jung Bahadur in the 5th decree. Jung Bahadur, therefore, being removed from Sham Narain in the 5th decree is the rightful heir to the estate left by Sham Narain. This was so held by the two Courts below, and I think they arrived at a right conclusion. The method of counting the degrees that I have adopted is supported by the course adopted in the case of *Babu Lal v. Nanku Ram* (1). That being the view that I have taken, I affirm the decision of the Court below and dismiss this appeal with costs.

Roe, J.—I agree that the position of the plaintiff as an heir has been fully established. The latest case quoted by the learned vakil for the appellant, which is that of *Buddha Singh v. Laltu Singh* (2) is in no sense opposed to the plaintiff's claims. Therein it is stated that although the position of a bandhu in Mitakshara law is based on consanguinity it must still be supported by the right to offer oblations to a common ancestor. And on p. 3 (of 20 C. W. N.) is set forth a quotation from Manu, Ch. 9, that the 4th descendant is the giver of oblations. Jung Bahadur is within four generations from Todur Mull and Sham Narain is within three generations. Therefore the position of Jung Bahadur is clearly one which entitles him to succeed to the estate of Sham Narain.

V.S./R.K.

Appeal dismissed.

1. (1895) 22 Cal 339.

2. A I R 1915 P C 70=37 All 604=30 I C 529=42 I A 208 (P C).

A. I. R. 1916 Patna 407

CHAMIER, C. J. AND JWALA PRASAD, J.
Ramsumran Prosad Sahu—Defendant
—Appellant.

v.

Mt. Sarbrain Choudhrai—Plaintiff—Respondent.

Appeal No. 737 of 1914, Decided on 30th March 1916, from appellate decree of Dist. Judge, Darbhanga, D/- 11th December 1913.

(a) **Contribution—Suit—Suit lies for contribution to land revenue.**

A suit for contribution in respect of revenue paid by the plaintiff which the defendant was bound to pay is cognizable by the civil Court.

[P 408 C 2]

(b) **Bengal Estates Partition Act (5 of 1897)—In conflict between amount of revenue determined under Act 5 of 1897 and Act 11 of 1859, former supersedes—Bengal Land Revenue Sales Act (11 of 1859).**

Where there is a conflict between the amount of revenue assigned at the batwara proceedings under the Estates Partition Act (5 of 1897), and that assigned at a proceeding to have a separate account opened under the Revenue Sale Law (Act 11 of 1859), the Court is bound to accept the former as conclusive between parties in a suit for contribution.

[P 408 C 2].

Harihar Prasad Sinha—for Appellant.

Laxmi Narayan Sinha—for Respondent.

Jwala Prasad, J.—This an appeal from the judgment of the District Judge of Darbhanga, dated 11th December 1913, affirming the decision of the Subordinate Judge of Darbhanga, dated 29th February 1912. The appeal arises out of a suit for contribution in respect of revenue paid by the plaintiffs for the entire residuary estate bearing Tauzi No. 6507. They allege that they were compelled to pay it in order to have the sale of the estate on account of Government revenue due from it set aside. It appears that in a partition proceeding under the Estates Partition Act 5 (B C), of 1897, the revenue assessed over this village Barsuan in suit was Rs. 486-9-8. It is admitted that the plaintiffs had to pay a moiety of the revenue assessed on this village, that is Rs. 243-4-9. This partition proceeding terminated in the year 1905. Subsequent to the partition defendant 1 applied to the Collector under the Revenue Sale Law 1 of 1859 to have a separate account opened and in that proceeding he got a revenue of Rs. 110 odd, in which his share was Rs. 55 odd, assigned to the patti.

The contention of the defendant mainly is that he is not bound to pay

more than what was fixed as revenue for his share in the proceedings for the opening of the separate account. Both the Courts have held that the defendant was liable to pay his share of the revenue assessed upon the estate in the batwara proceedings. It seems to me clear that in the proceedings taken for the opening of the separate account the defendant managed somehow or other to have assigned for his share a much smaller amount of revenue than that assessed in the partition proceedings under Ss 10 and 95 of the Act. The opening of the separate account under the Revenue Sale Law is not a proceeding in which the revenue is apportioned according to the liabilities of the cosharers in the estate or in proportion to the assets. In proceedings held on an application for the opening of the separate account no regular enquiry is held; the Collector's order rests upon the statement of the revenue made by the applicant and on the report submitted by the office as regards the proportionate share of the revenue to be assigned to the applicant's share whereas the Estates Partition Act provides not only for the allotment of lands proportionate to the interests of the proprietors, but also for the assessment of revenue on each separate estate proportionate to the whole amount of land revenue for which the parent estate was liable before the partition. The amount of revenue as thus assessed in the presence of all the proprietors is not only binding inter se but forms the basis of an agreement between the proprietors and the Collector, and under S. 95, Partition Act, each separate estate formed at the partition is separately made liable for the amount of land revenue assessed under the Act after the completion of the batwara.

The plaintiff in this case is entitled to insist upon the defendant being liable for the proportion of revenue assessed in the batwara proceedings. It has already been shown that according to the revenue assessed in the batwara proceedings the defendant was liable to the plaintiff for the amount of revenue that he did not pay but ought to have paid and which the plaintiff was compelled to pay in order to save his estate. The plaintiff relies upon the assessment of revenue in the batwara proceedings and the defendant relies, on the other hand,

upon the amount of revenue assigned to the patti at the proceeding for the opening of the separate account which is not an assessment of revenue in the legal sense of it. When there is a conflict between the figures arrived at or stated in these two different revenue proceedings, the civil Court is bound to accept the apportionment of the revenue at the batwara proceedings as conclusive and binding upon the defendant. The contentions of the defendant-appellant that the frame of the suit was bad and that the civil Court has no jurisdiction to entertain the suit do not appear to be sound. The suit for contribution for revenue paid by the plaintiff which the defendant was bound to pay has been rightly brought in the civil Court which was the only forum to determine the question. I therefore hold that the judgment of the lower appellate Court is correct and I affirm the same and dismiss the appeal with costs.

Chamier, C. J.—I agree. The case appears to me to be a very simple one. The plaintiffs in the suit were compelled to pay revenue which was payable by the defendant. There is no question that a suit for contribution is maintainable by the plaintiffs.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 408

MULLICK, J.

Amiruddin—Plaintiff—Appellant.

v.

Saidur Rahman and others—Defendants—Respondents.

Second Appeal No. 2997 of 1914, Decided on 6th April 1916, from decision of Dist. Judge, Purneah, D/- 20th June 1914.

Bengal Tenancy Act (1885), S. 111 (a)—Suit for declaration that plaintiff was lakheraj raiyat and not liable to pay rent is suit in effect to correct Record of Rights—Limitation is six years from date of final publication.

In a Record of Rights finally published in 1905 the plaintiff was shown as defendant's tenant liable to pay rent to him. In 1908 the landlord obtained an ex parte decree for arrears of rent which the plaintiff paid off. In 1912 the landlord again brought a suit for rent, which the plaintiff contested but his contention failed. On 7th October 1912 the plaintiff brought a suit for a declaration that he was a lakheraj raiyat and that he was not liable to pay rent :

Held: that the suit was in effect to correct the Record of Rights and as such was barred by limitation, having been filed after more than six years from the date of the final publication of the Record of Rights when the cause of action arose. [P 409 C 2]

Baldeo Narain Singh, Jogendra Nath Mukherji and Sivanandan Ray — for Appellants.

Mohammad Ishfaq for A. S. M. Akram — for Respondents.

Judgment.—The plaintiff is the tenant and the defendant is the landlord. The Record of Rights shows the plaintiff to be liable to pay rent to the landlord at a certain rate. In 1908 the landlord obtained an ex parte decree for rent against the plaintiff. In execution of that decree he brought to sale a holding and purchased it himself, but the tenant paid up the amount within one month and got the holding back. In 1912 the landlord again sued for rent. The plaintiff contested that suit, but failed and a decree was made against him on 1st August 1912. The plaintiff states that his cause of action accrued from the date of that decree and he brought the present suit on 7th October 1912, for a declaration that he is a lakheraj raiyat on the land and that he is not liable to pay rent to the defendant. The Munsif decreed the suit, but the Subordinate Judge has dismissed it on the ground of limitation; hence this second appeal by the plaintiff.

The only point urged before me is whether the suit is barred by limitation or not. The learned vakil for the appellant relies upon *Ram Gulam Singh v. Bishnu Pargash Narain Singh* (1) and says that the Record of Rights is at best only evidence creating a presumption of title and that it was not necessary for the plaintiff to sue to set aside that presumption; that the suit is not one that has any reference to the Record of Rights, but that it is a suit which he is entitled to bring under the general law and that his cause of action properly dates from the last rent decree. It is obvious that the suit is a declaratory suit. The learned vakil for the appellant does not admit, but it is quite clear, that the suit is one substantially under S. 111-A, Ben. Ten. Act. The plaintiff carefully refrains from making any reference to the Record of Rights, because he knows that the

1. (1907) 11 C W N 48.

period of limitation for getting declaratory relief in respect of entries in a Record of Rights is six years from the date of the publication. That has been decided in various cases and also in the case of *Ram Gulam Singh v. Bishnu Pargash Narain Singh* (1), which has been cited by the learned Vakil for the appellant. The only question is, whether the present suit is one under S. 111-A, Ben. Ten. Act. In my opinion it is. Although no reference is made to the Record of Rights, the effect of the declaration which the plaintiff seeks will be to correct the Record of Rights, and that being so, it makes no difference whether the plaintiff does in so many words attack the Record of Rights or not. The cause of action therefore accrued not on the date of the decree mentioned by the plaintiff, but on the date of the publication of the Record, and as that took place more than six years before the institution of the suit, the suit is barred. The appeal fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1916 Patna 409

MULLICK, J.

Midnapore Zamindari Co., Ltd. — Defendant—Appellant.

v.

Joyram Santal — Plaintiff — Respondent.

Second Appeal No. 3429 of 1913, Decided on 26th April 1916, from decision of Dist. Judge, Manbhum, D/- 26th July 1913.

Evidence Act (1 of 1872), S. 115—First rent decree granting ejectment — Subsequent suit for next year's rent—Deposit for latter claim before ejectment accepted — Held it amounted to waiver and it estopped landlord to eject—It is doubted if waiver is not pleaded in execution for ejectment suit can be based on it—Practice — Pleading — Waiver.

Defendants obtained a decree against plaintiff on 8th April 1911 for rent of the years 1314 to 1317 Amli, which directed that, in default of payment within a month, the plaintiff shall be ejected. The decree was executed and defendants were put into possession on 13th July 1911. On 13th April 1911 defendants instituted a second suit against plaintiff for rent for the year 1318 which became due in March 1911 and obtained a decree. Prior to the institution of this suit the plaintiff had made a part deposit of the latter claim in Court, which defendants accepted. Plaintiff instituted the present suit on 20th January 1912 for possession, on the ground that the defendants had waived their right to eject him by the proceedings in the

second rent suit by which they acknowledged him as their tenant to the end of the year 1318:

Held: that the defendants should be deemed to have waived the right to eject plaintiff, even though the right to eject did not actually accrue at the institution of their second suit and that it estopped the defendants from subsequently proceeding in ejectment in execution of the first rent decree: [P 410 C 2]

Dubitante.—Whether having failed to plead waiver in the proceedings in execution of the ejectment decree, the plaintiff could be permitted to plead it subsequently in a separate suit: 17 Bom 23, Ref [P 410 C 2]

Sitaram Banerjee—for Appellants.

Saroshi Chandra Mitter for *Bipin Ghose*—for Respondent.

Judgment.—The plaintiff was the *pradhan* or headman of *Mauza Dudhpusi* and the defendants were the *ijaradars*. On 18th July 1910 the defendants sued the plaintiff for rent of the years 1314-17 *Amli* and on 8th April 1911 obtained an *ex parte* decree, which directed that if the arrears were not paid within 30 days of the tenant's becoming aware of the decree he was to be ejected. That decree was executed and possession was given to the *ijaradars* on 30th July 1911. On 20th January 1922, the present suit was instituted by the plaintiff to recover possession of the *mauza* on the ground that the defendants were not competent to eject the plaintiff by reason of previous waiver. The waiver is pleaded in this way. On 30th April 1911, the defendants instituted a suit against the plaintiff for the rent of the year 1318, which apparently began in September 1910 and ended in September 1911. Previous to the institution of the suit the plaintiff had on 10th April 1911 deposited Rs. 51-13-0 into Court in part payment of the rent of the year 1318, the total demand on account of which was Rs. 64 approximately. This second rent suit was decreed on 15th July 1911.

The plaintiff's case is that the suit and the proceedings connected therewith constituted an acknowledgment by the defendants that the plaintiff was their tenant up to the end of the year 1318, i. e., 16th September 1911, and that therefore there was a waiver of right to eject which had accrued to the defendants upon the plaintiff's failure to make payment of the arrears decreed in the previous suit. It is assumed by both parties before me that the right to

eject accrued on 8th May 1911. The defendant's reply to this is that the rents for the year 1318, which were payable in advance, became due in March 1911, so that they were perfectly competent to sue for them on 30th April 1911 and that as the right to eject did not accrue till 8th May 1911, they could not at the institution of the suit be said to have waived a right which they did not then possess. Both Courts below have decided in the plaintiff's favour and held that there was a waiver. The defendants now prefer the present second appeal. The sole question argued by the learned counsel before me for the appellants is, whether the institution of the rent suits at a time when the right to eject had not accrued constituted a waiver. It is argued that there can be no waiver of a conditional right. I am however unable to accept this view. There was nothing to prevent the defendants from saying to the plaintiff:

"On 8th May on your failure to pay up the arrears decreed, a right to eject you will accrue to us. By bringing this suit for the arrears of 1318 we acknowledge you as our tenant till the end of that year, namely, 16th September 1911, and we waive the right to eject you in anticipation if it ever should arise."

This would be a perfectly valid promise and such a promise does, in my opinion, estop the promisor from subsequently proceeding in ejectment. The institution of the suit coupled with the acceptance of the money deposited for the year 1318 constituted a complete waiver and estopped the defendants from proceeding in ejectment in execution of the decree of 8th April 1911. I have some doubts as to whether, having failed to plead waiver in the proceeding in execution of the ejectment decree, plaintiff can now be permitted to plead it in a separate suit; but the case of *Mukund Harshet v. Haridas Khemji* (1) is some authority in plaintiff's favour. Moreover neither party has up to now raised the point and it need not therefore be decided. The appeal fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

1. (1893) 17 Bom 23.

A. I. R. 1916 Patna 411 (1)

KINGSFORD, J.

Chand Gorain and others—Plaintiffs—Appellant.

v.

Khub Lal Mahton—Defendant—Respondent.

Second Appeal No. 2639 of 1914, Decided on 15th June 1916, from decision of Dist. Judge, Patna, D/- 31st July 1914.

Bengal Tenancy Act (8 of 1885), S. 147 (a)—Compromise decree in contravention of S. 147 is nullity.

A compromise decree passed in contravention of the provision of S. 147 (a), Ben. Ten. Act, is a nullity: 18 I C 809, *Foll.* [P 411 C 2]

Pugh and Naresh Chander Sinha—for Appellants.*Chander Sekhar Prasad Singh*—for Respondent.

Judgment.—This appeal arises out of a rent suit brought by the appellants. The suit was decreed by the learned Munsif in accordance with a compromise decree, dated 29th February 1908, passed in a previous suit between the parties. On appeal by the defendants, the learned District Judge held that the compromise decree was a nullity under the provisions of S. 147 (a), Ben. Ten. Act. He accordingly decreed the suit in accordance with the settlement "khatian" which was finally published in October 1910. The plaintiffs preferred this second appeal. The first contention is, that the learned Judge has made a new case for the defendant. This contention appears to be erroneous, because the defence set up in paras. 6 and 11 of the written statement is clearly that the compromise was illegal and ineffectual. The second contention is that the suit in which the compromise decree was passed was not between landlord and tenant as such, and, therefore, the provisions of S. 147 (a) are not applicable. I find that the suit, which was brought by the present defendant against the predecessors of the present plaintiffs, was for a declaration regarding the amount of rent payable, and for the recovery of damages for illegal distraint. Recovery of compensation in such circumstances is provided for by S. 140, Ben. Ten. Act. It is clear that the suit was between landlord and tenants as such.

The third contention is, that the compromise decree did not infringe the

provisions of S. 29 of the Act. It certainly cannot be said that at the time of that compromise the defendants were not paying a money rent; for it appears from para. 2 of the plaint in the present suit, that the plaintiffs' allegation is that the defendants paid a money rent for certain lands, and "bhoul" rent for others. The defendants' contention, as set forth in para. 3 of the written statement, was that up to the period of the compromise he had always paid a money rent only. It is contended that the money rent was variable according to the crop grown. That, no doubt, was the plaintiffs' contention, but it was not that of the defendant. The learned counsel for the appellants relied upon a passage in para. 5 of the written statement. But in that passage the defendant is alluding not to the state of things previous to the compromise, but to the terms of the compromise itself. It was not necessary for the learned District Judge, nor is it necessary for this Court, to decide whether, as a matter of fact, the result of the compromise decree was to infringe the provisions of S. 29. It was sufficient for him to hold, as he did hold, that the defendants were paying a money rent at the time of the compromise decree. That being so, it necessarily follows that the compromise decree passed without recording evidence in the manner provided by sub-S. 3 of S. 147 (a) was without jurisdiction. The ruling in *Surjug Saran Lal v. Dukhit Mahto* (1) is sufficient authority for the proposition, that a compromise decree passed in contravention of the provisions of S. 147 (a) is a nullity. In my opinion, therefore, the learned Judge was right in treating the compromise as a nullity, and in decreeing the suit upon the basis of the "khatian." The appeal is accordingly dismissed with costs.

V.S./R.K.

Appeal dismissed.

1. (1913) 18 I C 809.

A. I. R. 1916 Patna 411 (2)

ATKINSON AND JWALA PRASAD, JJ.

Bhagela Koer and others—Appellants.

v.

Abdul Rahman and others—Respds.

First Appeal No. 406 of 1913, Decided on 20th June 1916, from decision of Sub-Judge, Shahabad, D/- 30th June 1913.

(a) **Contract — Covenant giving right to one person — On death that right devolves on two or more persons — No question of covenant being joint or separate arises but same cause of action remains enforceable by those persons.**

When a right accruing to a single person from a covenant in his favour devolves on his death on two or more of his heirs in several shares, no question can possibly arise as to whether the covenant was joint or separate, and the only difference caused by the death of the covenantee is that the cause of action which resided in one person is by the operation of law transferred to a number of persons who constitute one heir: 25 *Mad* 26, *Appr.* [P 413 C 2]

(b) **Civil P. C. (5 of 1908), O. 34, R. 1—All heirs of mortgagee must be impleaded.**

One of the several heirs of a mortgagee cannot claim the mortgage-debt without joining all heirs as parties. [P 414 C 1]

(c) **Civil P. C. (5 of 1908), O. 1, R. 9 and O. 8, Rr. 3 and 5 and O. 34, R. 1—Suit for joint property—All persons interested not joined — Suit barred against some — Whole suit must be dismissed for non-joinder—This applies to suit for recovery of assets of deceased by heirs.**

If a plaintiff sues to recover property which is the joint property of two or more persons, and he omits to join all proper and necessary parties, and if when the case comes to trial, the rights of those who ought to be added as parties to the suit are barred by limitation, the suit must be dismissed for want of proper or defective joinder of parties: 6 *Cal* 815; 14 *Cal* 791 and 7 *Bom* 217; 31 *Cal* 487 (*P C*); 21 *Bom* 154; 14 *All* 524; 4 *I R* 1914 *Cal* 455; 5 *A I R* 1914 *Cal* 396; 4 *I R* 1914 *All* 169 and 27 *Bom* 31, *Ref.* [P 414 C 1]

The aforesaid principle applies also to cases where several persons are entitled jointly and seek to recover the assets of a deceased person: 4 *I R* 1914 132, *Appr.* [P 414 C 2]

(d) **Civil P. C. (5 of 1908), O. 1, R. 9—Scope—When right to sue is barred against some O. 1, R. 9, does not apply.**

Order 1, R. 9, only applies to cases where relief can be given if the necessary parties are joined and the application is within time, but it has no application to cases where the parties to be joined are barred in the assertion of their rights. In that case, even though they may be joined, the suit must be dismissed. [P 414 C 1]

(e) **Limitation Act (9 of 1908), S. 20—Payment need not be cash—It may be by adjustment.**

To extend the period of limitation under S. 20, Limitation Act, it is not necessary that payment of a debt should be actually made in money; for any arrangement between the parties intended to have the effect of discharging pro tanto the party indebted has the same effect as the payment of money: *Maber v. Maber*, 2 *Ex* 153, *Ref.* [P 415 C 2]

(f) **Practice—Pleadings—Money suit—Plea of repayment—Details must be given.**

Per *Jwala Prasad, J.*—In a money suit where the claim is for the recovery of a specific amount the defendant ought clearly to state what sum has been paid off, and if all the claim was discharged he ought distinctly to say so. [P 416 C 2]

Pugh and Jayaswal — for Appellants.
Naresh Chander Sinha—for Respondent.

Atkinson, J. — This is an action brought on foot of a mortgage-bond dated 4th September 1897, and the amount for which that mortgage was security was the sum of Rs. 1,375. The bond provided that interest should be paid at 2 per cent. per mensem, together with compound interest to be ascertained yearly. The bond also provided that certain lots of land set out in the schedule to the deed, 9 or 10 in number, should be hypothecated as security for this mortgage-debt. The bond purported to be made between Raghunath Prasad Singh as mortgagor and Elahi Bukhsh as mortgagee. On 7th March 1900, decrees which Raghunath Singh had procured against other parties for Rs. 862-9-6 together with a further decree on 25th November 1900 for Rs. 840-11-0 making a gross total of Rs. 1,703-4-6 were transferred to Elahi Bukhsh and by mutual consent of the mortgagee and the mortgagor, the same were set off pro tanto in satisfaction of the mortgage-debt. On 25th November 1900 when the second decree was set off as against the mortgage-debt, there was something like Rs. 700 odd owing on foot of the bond for principal and interest. The receipts for these decrees, which were set off are endorsed upon the bond itself and purport to have been signed by the mortgagor Raghunath Singh. From 25th November 1900 no application was ever made by the mortgagee or those who represented him for payment of any portion of the interest that accrued due on foot of the balance ascertained in 1900. And thus when this action was brought on 14th June 1912, some 4 or 5 months before the action would have been barred by limitation of time, the interest had accumulated to the sum of Rs. 10,999, which is really regarded as principal by reason of the provisions as to compound interest under the deed, and some Rs. 4,000 representing simple interest, and Rs. 126 for costs making a gross sum of Rs. 15,000 in all.

The plaintiffs in this suit represent Elahi Bukhsh, the mortgagee, who died in the year 1907. The mortgagor is also dead, and the defendants in this suit are his representatives. Elahi Bukhsh at the time of his death left a son, Abdul

Rahman, three daughters and two wives. The second wife survived her husband ; of that there is no doubt, but the exact date of her death has not been ascertained. That she survived her husband and died subsequently is admitted ; and that on her death she left two brothers, who were her heirs and entitled to succeed to whatever portion of her husband's assets might devolve upon her. Elahi Bukhsh died in 1907 intestate; and thus his son and three daughters and his two wives became entitled jointly to succeed to his assets of which the property secured by this mortgage-deed formed a part. Clearly upon the death of the second wife, her two brothers became entitled to succeed to the share of the property that their sister had inherited through her husband. The action was instituted by the plaintiff Abdul Rahman as sole plaintiff, and the point was immediately taken in the defendants' pleading that all the proper parties had not been joined as plaintiffs in the action to entitle the sole plaintiff in the suit as originally constituted to succeed ; and it was alleged expressly in paras. 4, 5, 6 and 7 of the defendants' written statement that they, the defendants, would rely on the omission to join as plaintiffs the two brothers of the second wife, as legal sharers in the assets of Elahi Bukhsh and of which this mortgage formed a part. The plaintiff's advisers thought fit on 6th September 1912 to file a petition on behalf of three daughters of Elahi Bukhsh, asking the Court to join them as plaintiffs in the action although in their petition they stated that it was unnecessary for the purpose of the case that they should be joined. The Court granted the petition and the suit proceeded with the original plaintiff Abdul Rahman and the three added plaintiffs, being the three daughters of Elahi Bukhsh, the mortgagee. But the plaintiffs deliberately and wilfully abstained from taking any steps whatsoever, although forewarned, to add the two persons I have mentioned as parties to the action. I think it is undoubted law that the brothers of the second wife were entitled jointly with the son and three daughters of Elahi Bukhsh to a share of this mortgaged property; and the law seems to me to be accurately summed up in the case reported as *Ahimsa Bibi v. Abdul Kader*

Saheb (1), and at p. 35 it is stated as follows:

"When a right accruing to a single person from a covenant in his favour devolves on his death on two or more of his heirs in several shares, no question can possibly arise as to whether the covenant was joint or separate, and the only difference caused by the death of the covenantee is, that the cause of action which resided in one person is by operation of law transferred to a number of parceners, who, as observed by Tindall, C. J., constitute one heir."

I think it is quite clear that all the persons named and set forth in para. 4 of the written statement were jointly interested in the realisation of this mortgage security and the fruits of the mortgage itself. The action proceeded to trial in the form in which I have indicated. When it came before the learned Subordinate Judge who tried this case, he held that it was unnecessary to join the two brothers of the deceased second wife of Elahi Bukhsh, because it was stated in the defendants' written statement that they were the "heirs" of Elahi Bukhsh. I find no warrant for any such suggestion, because in para. 7 of the plaint the two classes specifically mentioned as being necessary parties to be added as plaintiffs are named as legal sharers and heirs. The Judge who tried the case appears to me to have completely overlooked the law, the well-decided law applicable to cases like the present one. When this action came on for hearing on 30th of June before the learned Judge, no application by the plaintiffs was even then made to join the two brothers of the deceased second wife of the mortgagee. But even if any such application had been made and acceded to, it would have been without avail, because by then the rights of the two persons, who might have been joined as plaintiffs jointly with the other plaintiffs as parties interested in the recovery of this mortgage-debt would have been barred by limitation of time. The entire cause of action in this case would have been barred on 20th November 1912, and thus, as no attempt was made to join the two persons I have mentioned before that date, the Judge, on the authorities, could not have joined them at all at any time subsequent to 20th November 1912, because as against them limitation of time had run; and the

joining of them as plaintiffs would not have entitled the Court to give the relief, either in whole or in part, claimed in this action.

We have been referred to the interpretation and construction to be put upon O. 34, R. 1, and O. 1, R. 9, which provides that no action is to be defeated by the reason of non-joinder or misjoinder of parties. That order, O. 1, R. 9, only applies to cases where relief can be given if the necessary parties are joined and the application is within time; but it has no application—and the law is too well decided now to admit of any doubt whatsoever—it has no application to cases where the parties to be joined are barred in the assertion of their rights. If they are barred, then the Court, even though it may join them, can give no relief at all, and the action consequently must be dismissed. The reported cases dealing with this aspect of the matter and laying down the law, I think clearly beyond all doubt, are *Ramsebuk v. Ramlall Koondoo* (2); *Ramdoyal v. Junmenjoy Coondoo* (3); *Kalidas Kevaldas v. Nathu Bhagvan* (4); *Raj Chunder Sen v. Ganga Das Seal* (5); *Balkrishna Sakharan v. Moro Krishna Dabholkar* (6); *Imam-ud-Din v. Liladhar* (7); *Sidheshuri Pershad Narain Singh v. Dharamjit Narain Singh* (8); *Saced-ud-Din Khan v. Hira Lal* (9); *Shiam Sunder Lal v. Budhu Lal* (10) and *Jotiram Ramkrishnav. Ramkrishna Nandlal* (11). Reading all these cases and applying them and the legal principle which they decide, it appears to me abundantly clear, that if a plaintiff proceed to trial to recover property which is the joint property of two or more persons, and he omits to join all proper and necessary parties, and if when the case comes to trial, the rights of those who ought to be added as parties to the suit are barred by limitation, then the Court has no alternative but to dismiss the appli-

cation for want of proper or defective joinder of parties. The responsibility for what has happened in this case rests solely with the plaintiff's advisers. The case reported as *Ambika Charan Guha v. Tarini Charan Chanda* (12), I think, accurately in the headnote sets out a summary of what the law is as follows:

"If a necessary party is not on the record, the proper course is to apply to have him joined. If he is not brought on the record at all, or if, when he is brought on the record, the suit as against him is barred by limitation, the suit will be dismissed."

I think that headnote accurately and carefully sums up the general principle decided by the long list of cases to which I have referred. No doubt, many of the cases deal with partnerships, but for the reasons which I have already stated, I think they apply with equal force to the cases where several persons are entitled jointly and seek to recover the assets of a deceased person. There is no question in this case of Administration or Probate having been taken out by the plaintiff Abdul Rahman. His father died intestate and his issue and next of kin, together with the heirs of his deceased wife who survived him, became entitled according to their respective shares to recover the assets of the deceased Elahi Bukhsh.

It was mildly suggested, that the ordinary rule of devolution applicable to the estate of a deceased Mahomedan who dies intestate, does not apply in this case, because it is alleged in para. 3 of the plaint that a practice prevails in the plaintiff's family, whereby the entire estate of a deceased parent dying intestate vests in the eldest male heir of such deceased to the exclusion of the other next of kin and by reason of such custom the plaintiff Abdul Rahman was entitled alone to recover on foot of the mortgage-deed of 4th September 1897. I can only say that upon the evidence, which I have scanned very carefully, I cannot find one scintilla of justification for such a practice or custom. Custom may override the ordinary law if it be established clearly and unequivocally, but it must be certain, continuous, ancient and unambiguous. I dismiss this argument of the learned vakil for the respondents in this case, by saying that the custom which he has asserted to have existed

2. (1881) 6 Cal 815.

3. (1887) 14 Cal 791.

4. (1888) 7 Bom 217.

5. (1904) 31 Cal 487=31 I A 71 (P C.)

6. (1897) 21 Bom 154.

7. (1892) 14 All 524.

8. A I R 1914 Cal 455=41 Cal 727=22 I C 570.

9. A I R 1914 Cal 396=24 I C 25.

10. A I R 1914 All 169=24 I C 252.

11. (1903) 27 Bom 31.

12. A I R 1914 Cal 132=19 I C 963.

has not been established by any form of legal proof whatsoever.

The conclusion at which we have arrived on this aspect of the case in itself is quite sufficient to justify us in dismissing this action. Speaking for myself alone, because my learned colleague does not agree with me, I am of opinion that this action should also be dismissed upon the further ground that the plaintiffs in this case have not in any way whatsoever given any legal proof that any money was or is due on foot of the mortgage-bond. The mortgage bond is produced and thrown upon the table, and it is contended when that is done it establishes sufficient proof of the existence of the debt to throw the onus of rebutting it upon the defendants, the mortgagors. That may be so in some cases, but it is not universally true. Each case must depend upon its own facts. But when you find a mortgage, such as the present one, old, not recognized or acted upon for nearly 12 years, and peculiar in its terms, I think the onus is shifted. But more especially do I think that the obligation is upon the plaintiff to prove his debt, by reason of the account which he appends to his plaint as a summary of the debt which he seeks to recover.

He says, in effect, that that account represents the money that he is entitled to, and although he calls several witnesses, he never asks one of them, who made the account? what formed the basis of the account? how it was prepared and if it accurately represents the money due on foot of the mortgage. When the learned Judge gave a decree in this case, he had not before him one scintilla of legal evidence to show what was the amount due on foot of the mortgage-bond: unless he accepted as obviously correct an unproved account, which, I understand, was prepared by the learned Vakil on behalf of the respondent. In my opinion that is not legal proof. No doubt, the account was prepared upon the basis of the machinery provided by the mortgage-bond itself. That is not sufficient to constitute legal proof of the existence of a debt. The learned Subordinate Judge directed no account to be taken but accepted without question the validity and accuracy of the unproved account annexed to the plaint. Therefore I would have been prepared myself to

have dismissed the action upon that ground; and more especially, because the validity of this account, the accuracy of this account, was put in issue expressly by the pleadings of the defendants, and the issue is directed and framed by the learned Judge, as to whether the account is correct or not. And without one scintilla of evidence to justify the finding on that issue the learned Judge found that the full sum claimed in this action is due. If the case was tried by a Jury the verdict could not stand for a moment. Why should it stand now? Why should the Judge be permitted to make assumptions in a point of law, when there is no legal evidence to justify them?

It is hardly necessary to discuss the question as to whether the two decrees which were transferred, and by mutual consent set off as against the mortgage-debt, constituted valid payments, taking the case out of the Statute of Limitations. I am perfectly satisfied they did constitute valid payments. It is established beyond all doubt, that it is not necessary that payment should be actually made in money; for any arrangement between the parties intended to have the effect of discharging pro tanto the party indebted, has the same effect as the payment of money. The Limitation Act is based very largely upon the principles of the Limitation Acts in England and the authority for the proposition I have stated, is to be found in the case of *Maber v. Maber* (13).

For these reasons, I think this action should be dismissed with costs here and in the Court below.

Jwala Prasad, J.—I concur with my learned brother as to the dismissal of the suit on the ground of non-joinder of the two persons interested in the mortgage, which is the foundation of the suit. I also agree with my learned brother that the plaintiff in this case has proved that there were valid payments as entered on the back of the mortgage-bond, so as to save the suit from being barred by limitation. As my learned brother has already pointed out, I am not in accord with him as regards the view that the plaintiff has not established his claim as he has not proved the account upon which the suit is based. I need hardly give detailed reasons for my dif-

fering from my learned brother on this point. I would only briefly refer to some of the salient grounds. In this case the execution of the bond was satisfactorily proved by the attesting witnesses called by the plaintiff, it was further proved that the consideration of the bond passed. After the death of the mortgagor, Raghunath Charan Prasad Singh, a petition under Act 8 of 1890, called a petition for guardianship of the minor grandsons of the mortgagor, was filed by his widow, Mt. Bhagela Koer, defendant in the case, on 5th September 1910, before the District Judge of Shahabad, and in the schedule, required by the Act for the specification of the debts and liabilities, this bond is mentioned as item 5. The bond itself shows, on the back of it, two payments that have been credited in the account annexed to the plaint as a part thereof and duly verified. The defendants in this case never specifically alleged that they had paid anything beyond what was clearly stated by the plaintiff. The learned Subordinate Judge has held as clearly established that the mortgage-bond is a genuine document and was executed for good consideration. I think in a money suit, where the claim is for the recovery of a specific amount, the defendant ought clearly to state what sum has been paid off, and if all the claim was discharged he ought distinctly to say so. vide O. 8, Rr. 3 to 5. The allegation in the written statement that the account is incorrect does not necessarily go to show that there was nothing due. The issue relating to this matter is issue 4, "Is the account given in this plaint correct?" The account is based entirely upon the mortgage-bond which distinctly mentions the amount advanced, the rate of interest and on the back of it mentions the amount received. The further calculation is a matter of arithmetic. It is apparent from the finding of the learned Subordinate Judge on this issue that the defendants contested the correctness of the account only on the ground that compound interest should not have been charged, which, however was rightly held to be allowable under the terms of the bond. The account based upon the bond being prima facie correct, I think it is for the defendant to show in what respects the account is wrong. Regard being had to

the pleadings in this case and the issues framed, I think that if the suit were not dismissed on the fatal defect of the non-joinder of some of the necessary parties to the suit, the claim of the plaintiff could not be thrown out on the ground that he had not proved the account in this case. No objection as to the account not having been proved has been taken in the grounds of appeal filed in this Court. It is unnecessary to go into this matter any further as the plaintiff's suit must be dismissed on the grounds already stated.

V.S./R.K.

*Appeal accepted.***A. I. R. 1916 Patna 416**

ROY AND JWALA PRASAD, JJ.

Lalu Singh and others — Appellants
v.*Sahdeo Singh and others — Respondents.*

Second Appeal No. 2716 of 1915, Decided on 10th July 1916, from decree of Sub-Judge, Chapra, D/- 28th July 1915.

Evidence Act (1 of 1872), S. 32—Recital about boundaries in title deeds of third parties when admissible stated.

Under S. 32, Evidence Act, a statement of boundaries in documents of title is legal evidence in a suit between third parties, if the third parties are dead or outside the jurisdiction of the Court: 21 I C 618, *Dist*; A I R 1915 Mad 746; 12 I C 149; 13 I C 120 and 18 I C 752, *Foll*; 23 Bom 63, *not Appr*. [P 417 C 1]

*Rajindra Prasad—*for Appellants.*Ram Prasad—*for Respondents.

Roy, J.—The short point for decision in this case is whether in documents of title the boundaries given of land, which has been the subject-matter of a transaction between third parties, are admissible in evidence if those third parties are dead or outside the jurisdiction of the Court. The case against this contention is *Ningawa v. Bharmappa* (1), but this decision seems to have been dissented from in all the Courts in India save that of Bombay: *Saripalli Venkatarayagopala Raju v. Fota Narasayya* (2), *Abdullah v. Kunja Behari Lal* (3) as *Imrit Chamar v. Sridhar Panday* (4), as *Natwar v. Alkhu* (5), a judgment of the Allahabad High Court, dated 17th, January 1913. In all these cases it has been held that under S. 32, of the Evi-

1. (1899) 23 Bom 63.

2. A I R 1915 Mad 746=26 I C 747.

3. (1911) 12 I C 149.

4. (1912) 13 I C 120.

5. (1913) 18 I C 752.

dence Act a statement of boundaries in documents of title is legal evidence. I have had the advantage of seeing the judgment of my brother Atkinson in appeal from Original Decree No. 2404 of 1914. None of the cases which I have quoted was brought to his notice. The only case quoted was the contrary case of *Abdul Ali v. Syed Rejan Ali* (6), which dealt only with documents prepared in the course of litigation and not with transactions affecting title. Atkinson, J. said:

"If the documents were documents of title, the boundaries described in them would be of value and importance and such documents would be admissible on a well-recognised principle."

The appellants' contention that the documents relied upon were not admissible in evidence must fail. The appeal is dismissed with costs.

Jwala Prasad, J.—I agree.

v.S. *Appeal dismissed.*

6. (1913) 21 I C 618.

A. I. R. 1916 Patna 417

MULLICK, J.

Bidya Nath—Plaintiff—Appellant.

v.

Khikhinda Koer — Defendant—Respondent.

Second Appeal No. 2268 of 1914, Decided on 14th April 1916, from decision of Dist. Judge, Muzaffarpur, D/- 9th June 1914.

(a) **Transfer of Property Act (4 of 1882), S. 111 (g)—Permanent tenancy—Denial of landlord's title—Determination of—Landlord entitled to sue for ejectment.**

A permanent tenancy under the Transfer of Property Act, is determinable by the tenant's denial of the landlord's title and the latter can sue for ejectment of such tenant: 24 Cal 440, *Foll.* [P 418 C 2]

(b) **Civil P. C. (1908), S. 100—Inference as to status is question of law.**

An inference as to a question of status is always a question of law and hence liable to be rejected in second appeal. [P 417 C 2]

Mustafa Khan for Laxmi Narain Sinha and Harnarain Prasad — for Appellant.

Rajendra Prasad—for Respondent.

Judgment.—The plaintiff is the landlord and the defendant is a person who was originally described by the plaintiff in a former suit as a trespasser but who, having succeeded in that suit in proving that he was a tenant, is now described in the present suit as a tenant

subject to the provisions of the Transfer of Property Act. The suit is for ejectment from a plot of land measuring 1 bigha 3 cottas, on which there are a number of mango trees. The previous history of the litigation is this. The defendant having in the Record of Rights been entered as a tenant at fixed rates, the plaintiff in 1908 brought a Suit (No. 495 of 1908, also described as No. 33 of 1908) for ejectment on the ground that the land was zerait land of the plaintiff and that the defendant had no tenancy therein. In that suit the defendant denied the title of the plaintiff altogether and said that a third party was her landlord. She also asserted that she was a tenant at fixed rates. The defendant succeeded in part and it was held that the plaintiff was the landlord but that the defendant was his tenant and that the plaintiff was entitled only to receive rent from the defendant. The plaintiff thereupon brought the suit out of which the present appeal arises, praying to eject the defendant on forfeiture for denial of his title as landlord. The Munsif decreed the suit, but on appeal the District Judge dismissed it; hence the present second appeal by the plaintiff. The learned District Judge states that the plaintiff has not shown that the land is not agricultural land, and he seems to be of opinion that the defendant's tenancy is a tenancy at fixed rates within the meaning of the Bengal Tenant Act, and that for that reason the plaintiff is not entitled to eject. The first question, therefore, that arises is whether the tenancy is one under the Bengal Tenancy Act or not.

The learned District Judge's finding as to the character of the land is, no doubt, a question of fact, but his inference as to whether the tenancy was one to which the Bengal Tenancy Act applies is assailable on two grounds, firstly, because it is an inference which has been drawn from no evidence whatever, and secondly, because it is an inference as to a question of status which is always a question of law. It appears that in the Court of first instance no oral evidence was given on either side of the purpose for which the tenancy was created and the parties proceeded to trial on the documentary evidence alone on this point. Now the

Record of Rights is in favour of the defendant and throws the burden of proof upon the plaintiff. The learned District Judge says that the mere holding of a hat upon the land would not take the land out of the operation of the Bengal Tenancy Act, if the land was originally let out for an agricultural purpose and he relies upon the case of *Secy. of State v. Karuna Kanta Chowdhry* (1) in support of this proposition. That is no doubt perfectly correct, but the point is whether upon the evidence the plaintiff has succeeded in showing that the land was not let out for the purpose of cultivation 'either of crops or of fruit. The plaintiff's case in the previous suit of 1908 was that the land was zerait land, but it was found in the litigation ending with the appeal judgment, dated 8th September 1909, that the defendant had become a tenant or was a tenant by reason of the fact that he had for at least 20 years held the hat partly for the sale of bullocks and partly for other purposes. The defendant never alleged in that suit that his tenancy was one for the purpose of cultivation. That was a defence which he ought to have taken and did not take. He ought to have resisted the prayer for ejectment on the ground that he was a tenant at fixed rates within the meaning of the Bengal Tenancy Act, but he did not.

In my opinion he cannot, in the present suit, set up a defence which he ought to have taken in the previous suit. The question therefore is whether the finding of the appellate Court in the previous suit does not rebut the entry in the Record of Rights. In my opinion it does. The Court found that the tenancy was a tenancy created by operation of law by reason of receipt of rent from persons holding a hat upon the land. There was no finding and it was not anybody's case that the land was used for the purpose of cultivation or for any other agricultural purpose. There is no suggestion in this case that the hat was for a purpose ancillary to cultivation and, therefore, the case of *Sheikh Hedayat Ali v. Kumar Kalanand Singh* (2) does not apply. In my opinion the principles enunciated in the case of the *Raniganj Coal Association, Ltd. v.*

Judoonath Ghose (3) are applicable to the present case. The learned District Judge, therefore, in my opinion is wrong in stating that the plaintiff has failed to show that the land was not used for agricultural or horticultural purposes. He has overlooked the judgment of the appellate Court in the previous litigation. If, therefore, as I hold to be the case, the Transfer of Property Act, and not the Bengal Tenancy Act, applies to the tenancy, the question arises whether the plaintiff can eject the defendant; and this part of the case is concluded by the decision of *Kally Dass Ahiri v. Monmohini Dasse* (4), which is clear authority for the proposition that a permanent tenancy under the Transfer of Property Act, is determinable by denial of the landlord's title. The plaintiff, therefore, must succeed in the present suit. The decree of the lower appellate Court will be set aside and that of the Munsif restored. The appeal is allowed with costs.

v.S.

Appeal decreed.

3. (1892) 19 Cal 489.

4. (1897) 24 Cal 440.

A. I. R. 1916 Patna 418

ROE AND JWALA PRASAD, JJ.

Hardeo Singh and others—Petitioners.

v.

Ram Chariter Singh and others—Opposite parties.

Criminal Revn. No. 112 of 1916, Decided on 20th June 1916.

(a) Criminal P. C. (5 of 1898), Ss. 145 and 439—High Court is slow to interfere in revision.

A High Court will interfere in only very exceptional cases with orders made under S. 145, Criminal P. C. [P 420 C 2]

(b) Criminal P. C. (5 of 1898), S. 145—Some plots excluded from inquiry—Order passed in respect of possession of those plots is ultra vires.

Where a Magistrate, after a protracted inquiry into a dispute relating to certain lands, excluded some specified plots from the scope of the inquiry and cancelled the proceedings in respect of those plots, and another Magistrate, who succeeded him in office, passed orders declaring one of the parties in the possession of such excluded plots:

Held: that the Magistrate had no legal authority to go into the question of possession in those plots and that his final order with regard to them was passed without jurisdiction. [P 420 C 2]*S. Sinha and Nirsu Narayan Sinha*—for Petitioner,*Ram Prasad and B. B. Lall*—for Opposite Parties.

1. (1908) 35 Cal 82 (FB).

2. (1913) 20 I C 332.

Judgment.—In this case the petitioner is aggrieved by an order made under S. 145, Criminal P. C., on 20th April 1916, by Babu Matukdhari Singh, Deputy Magistrate at Chapra. It appears that a report was received from the police described in a proceeding dated 14th December 1915 as the Mofussil Police, and action taken thereon under S. 145 sometime in November or December 1915. The proceedings are not before us but the essential facts thereof are clear from a certified copy on the record. The Mofussil Police reported that there was a dispute between Hardeo Singh, first party, and Ram Chariter Singh, second party, likely to cause a breach of the peace. On this Mr. Karam Hussain, Deputy Magistrate, drew up proceedings under S. 145. Later a cross-report was received from the Revilganj Police that there was a dispute between Ram Chariter Singh, first party, and Hardeo Singh, second party, in regard to sixty bighas of land which had been measured as plots Nos. 661 and 671—4714 at the Cadastral Survey and recorded in the name of Ram Chariter Singh. On receipt of this report the Deputy Magistrate compared the Mofussil Police Report with the Revilganj report and both with a judgment of 1905, which, is Ex. G of the record, and wrote as follows on the proceedings already taken on the report of the Mofussil Police :

"I have seen the judgment of case S. 145, Civil P. C. That case refers to Survey Nos. 658, 664, 665, 651, 652, 653, 654 and 660. This is binding on both parties. This case is regarding plots Nos. 664, 665 and 535. The second party do not claim plot No. 535, so there is no more dispute regarding the lands for which this proceeding was drawn up. The proceedings are, therefore, dropped. The second party are warned against entering in plots Nos. 664, 665 and 535. From the report of Revilganj Police Sub-Inspector it appears that there is dispute between the parties regarding the Survey plots Nos. 661 and 671—4714 and there is likelihood of a breach of the peace over these lands. A separate proceeding under S. 145, Civil P. C., will be drawn up regarding these lands. The case is fixed for 8th January 1915."

Thereupon the proceedings on the Mofussil Report were filed and a fresh order sheet opened upon the Revilganj report with the order:

"Dated 14th December 1915.—From the report of the Revilganj Police Sub-Inspector it appears that there is dispute between the parties regarding the survey plots Nos. 661 and 671—4714 and there is likelihood of breach of the peace over

these lands. A separate proceeding under S. 145 Civil P. C., will be drawn up regarding these lands. The case is fixed for 8th January 1915."

On 18th December 1915 a petition was filed by Hardeo Singh the second party, to the effect that there was a discrepancy in the Revilganj report, inasmuch as plots Nos. 661 and 4714 measured only 32 bighas whereas the land said to be in dispute measured 60 bighas. Hardeo Singh also asserted that this 60 bighas was in fact the plots Nos. 664, 665 and 535, which in the proceedings upon the Mofussil Report Ram Chariter had given up. He therefore, asked that an amin be deputed to locate plots Nos. 664, 665 and 535, and that an order be issued on Ram Chariter to refrain from entering upon plots Nos. 664 and 665 as ordered in the proceedings on the Mofussil Report. On 22nd December 1915 Mr. Karam Hussain ordered that an amin be deputed to demarcate plots Nos. 661, 4714, 664, 665 and 535 and submit a report with his map. On 31st January 1916 the amin submitted a report and a map. His map showed the position of the plots which he had been ordered to demarcate, and his report showed that the plots over which the parties were fighting measured 60 bighas as stated by the Revilganj Police and was shown in the quadrangle L. N. O. J. in his map. He further reported that 10 bighas of this quadrangle fell in plots Nos. 661—4714, that the whole of Nos. 664 and 665 was within the quadrangle and that the remainder of the quadrangle fell in plots Nos. 663, 666 and 669 of the survey map. He further stated that the plot L. N. O. J. was parti land and that Ram Chariter and others claimed it as settled with them by the Dumraon Raj. Upon this report Mr. Hossain wrote:

"31st January 1916.—The amin has prepared a plan which shows the lands disputed by the parties are within the boundary marked L. N. O. J. and plots bearing Nos. 661—4714. It is to be noted that there was a case under S. 145, Civil P. C., about Nos. 665 and 664 which is within L. N. O. J., in which it was held that these plots are in possession of Hardeo Singh and others. No evidence is required for these plots. The judgment of the Court is binding on both parties. Draw up proceedings regarding the disputed land, calling on both parties to show cause on 14th February 1916 to file their written statements and adduce evidence regarding their claim to actual possession. Matbar Singh is added as second party to the case."

On 23rd February the case was transferred to the file of Babu Modeswara

Singh, Deputy Magistrate. He on 8th March 1916 wrote:

"On going through the written statements filed by the parties and the petition filed by the first party, I find that the plot of land marked in amin's map within L. N. O. J. is only in dispute, so amend proceedings accordingly as prayed for by the first party."

The proceedings were amended and a number of other parties added on information given in the written statements. On 1st April 1916 the case was transferred to the file of Babu Matukdhari Singh. After a prolonged hearing Ram Chariter Singh and others were declared to be in possession of the whole quadrangle L. N. O. J. With regard to plots Nos. 664 and 665 the Deputy Magistrate has written:

"From the proceeding, Ex. F, in the 145 case of 1905 and the proceeding in the present case. I am not in a position to say if the land in dispute in the present case formed part of the subject-matter of the dispute in the preceding case. From the judgment, Ex. G, in the first 145 case it appears that plots Nos. 664 and 665 were held to be in possession of Hardeo Singh and others. But this occurred in 1905 and there may have been some changes."

Clearly this was most unfair to Hardeo Singh and his party. The land had been shown by the amin to be parti. It had been identified as plots Nos. 664 and 665. Mr. Karam Hossain had on 14th December 1915 warned Ram Chariter and his party against entering on plots Nos. 664 and 665 and had on 31st January 1916 promised Hardeo that his possession in these plots should be maintained. The High Court will interfere

in only very exceptional cases with orders made under S. 145. We have set forth the facts at full length in order that it may be clear that they were in this case probably unique. There had been an express direction made by Mr. Karam Hossain under S. 145 (5) that the proceedings with regard to plots Nos. 664 and 665 be cancelled. This direction was again emphasised in a later order. It must be presumed that the orders of Mr. Modeswara Singh were issued in the same spirit as those of Mr. Karam Hossain. The question of possession in plots Nos. 664 and 665 was not before Mr. Matukdhari Singh at all. He had no legal authority to go into the question of possession in these plots. His order declaring Ram Chariter Singh and others to be in possession of plots Nos. 664 and 665, was made without legal authority. We declare it null and void. The order of Mr. Matukdhari Singh in respect of so much of the quadrangle L. N. O. J. as is not covered by plots Nos. 664 and 665 was legally made. His orders in respect of plots Nos. 664 and 665 were illegally made and are hereby declared a nullity. The District Magistrate will maintain Ram Chariter Singh and others in possession of so much of the quadrangle L. N. O. J. as is not covered by plots Nos. 664 and 665. He will maintain Hardeo Singh in possession of plots Nos. 664 and 665 until evicted in due course of law.

V.S./R.K.

Orders modified.

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